United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-7403

United States Court of Appeals

For the Second Circuit.

LEROY PORSS,

Plaintiff-Appellee,

-against-

MARITIME OVERSEAS CORPORATION,

Defendant-Appellant.

On Appeal From The United States District Court For The Southern District Of New York

Joint Appendix

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(In the robing room)

MR. STEARNS: Your Honor, I think this is a very serious question in this case.

THE COURT: It may be, but the question is, is it admissible? Where is the burden, first, to show that it was or was not intentional? Does the plaintiff have any burden?

MR. STEARNS: The plaintiff has the burden, of course, of proving negligence. If he testifies to a set of facts as he does, then the views most favorable to him are only suggestive in equal measure of negligence as of deliberate act, in which case there is a failure of proof.

THE COURT: What do you say the plaintiff has to prove as to intent?

MR. STEARNS: He has to prove negligence. If it is an intentional act, it is not negligence. If it is not negligence, it is only unseaworthiness. And the only proof of unseaworthiness is through proof of vicious propensities. The distinction and the two ways you can --

THE COURT: I don't know. Unseaworthiness goes a long way. I don't know if I can agree with you. Never mind further discussion about it. How are they going to prove negligence?

MR. STEARNS: That is Mr. Goldstein's problem.

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THE COURT: That is his problem.

MR. STEARNS: I say the facts, and I would ask for a charge, and I will -- and I would now ask that Mr. Goldstein not discuss this point of the case with Mr. Porss batween now and 10 o'clock tomorrow --

MR. GOLDSTEIN: I tell you pointblank that I will discuss every part of this case with my client, and that nobody can stop me from discussing the matter of the case with my client.

MR. STEARNS: Unfortunately, then, we have a serious problem.

THE COURT: Let us go back to fundamentals. You say that it is up to the plaintiff here to show negligence on the part of the ship; correct?

MR. STEARNS: That is right, sir.

THE COURT: And if the plaintiff does not show negligence, you say there is no cause of action.

MR. STEARNS: No, sir, I say that of course he has, as every seaman, a cause of action for negligence and/or unseaworthiness. In the context of this case --

THE COURT: You say it cannot be unseaworthiness.

MR. STEARNS: I say it can indeed.

THE COURT: It can.

MR. STEARNS: Certainly. And here is how: It can

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be unseaworthiness if --

THE COURT: As to the men?

MR. STEARNS: If these men are not of disposition, whatever the phrase is, the catch phrase --

THE COURT: That is usually an assault case, of course.

MR. GOLDSTEIN: He is trying to make this an assault case.

THE COURT: Wait a minute. I am listening to him. And when you get a turn, I will tell you.

MR. STEARNS: You see, whether it is an assault case in the sense of striking with a hand or an object is unimportant. What I am talking about is an assault as an intentional act, and the intentional act breaking the train of negligence or being something apart from negligence.

So if there is something done by a crewman to a crewman, where for example a fight breaks out, and one seaman strikes another --

THE COURT: Yes, and you have got to go back and show knowledge, haven't you, and notice; right?

MR. STEARNS: A disposition not equal to --

THE COURT: How are you going to show that?

MR. STEARNS: I am saying if Mr. Goldstein can come forward with proof that Schmidt or Frank were not of

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disposition, of equal stature of their calling, if they were people of vicious propensities, then the ship, if the jury believes intentional act, is unseaworthy. But if the jury believes an intentional act, not negligence, and there is no proof of evil disposition, then there is a failure of proof. Because an assault case is in the main an unseaworthiness action. The only exception is when a superior strikes a person below rank --

THE COURT: I understand all of that, but the application to this case is somewhat remote, it seems to me. You will have an opportunity to move to dismiss this case after the plaintiff closes.

What have you got outside the doctor? Anything, counselor?

MR. GOLDSTEIN: I have two depositions.

THE COURT: Whose are those?

MR. GOLDSTEIN: They are Antoniou and Schmidt.

MR. STEARNS: Both taken by the defendant.

THE COURT: How long are those going to take?

MR. GOLDSTEIN: I don't know, Judge. I don't know how much the defendant is going to read from them.

THE COURT: I am asking you how much your part of those depositions is going to take? I am not asking you what his is going to take.

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MR. GOLDSTEIN: A half hour at the most

THE COURT: All right. And then I don't know whether you want to read yours at that time or reserve for the defendant's time. Which do you want to do?

MR. STEARNS: I would assume -- what would you plan then? Is this doctor still scheduled for --

THE COURT: Oh, he wants the doctor, I suppose, Thursday sometime.

MR. STEARNS: He has rested on liability. I will probably make the motions and then read my sections of the depositions.

THE COURT: You won't be at a conclusion, counselor, technically. Both of you got yourself into this nuisance of combining a united trial and now the doctor can't show up. I don't want to split it back again, Mr. Stearns, if that is what you are talking about.

MR. STEARNS: No.

MR. GOLDSTEIN: Judge, as I gather, if I may be so bold as to get a word in here --

THE COURT: I was going to call on you. Go ahead.

MR. GOLDSTEIN: I gather, Judge, that what Mr. Stearns is saying is that if I will rest without putting my doctor on, and be allowed to put the doctor on out of turn, Mr. Stearns will then make his motions, and if your Honor

vc 6

denies those motions, he will then put on his entire case with the exception of his doctor. And then we will have the two doctors at the end of it, which will probably be just about Thursday.

MR. STEARNS: First of all, I didn't say that. What I said was that I considered doing that. I don't know whether I will.

MR. GOLDSTEIN: I didn't say you will.

THE COURT: You have got to talk about realities before you start throwing things up in the air.

MR. STEARNS: But I am principally concerned here with --

THE COURT: I think what you are concerned with may well await any motion made by you at the end of the plaintiff's case so far as liability is concerned. I don't say that that is going to be split again and divorced again. There has been a divorce and there has been a remarriage, and I think we have to go along on a remarriage basis now, much as I regret it.

Actually, it seems to me that this is a case, no matter what each one of you may think separately, which ought to be settled for an agreeable amount. I am going to ask Mr. Goldstein if he will specify at this time a reasonable amount which his client will take. I await your answer,

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THE COURT: He says what never happened?

MR. STEARNS: He says the slipping or the man being pulled forward.

THE COURT: There you are, counselor. You might not get to first base on the liability part. If this has to go to the jury, it will have to go with a complete bit on special verdict, both on liability and on damages. I am not going to obviate that. You must have that.

MR. GOLDSTEIN: I don't object to that, Judge.

THE COURT: If you did, I would overrule your objection. So that is that.

MR. GOLDSTEIN: That is an additional reason why I won't object to it, Judge.

THE COURT: I have to note some degree of agreement.

MR. GOLDSTEIN: Judge, I think a fair sum for settlement at this moment --

THE COURT: Say it softly, now.

MR. GOLDSTEIN: -- without being left to the exigencies of the trial, is $12,500.

THE COURT: I don't know, from what I hear so far, it is questionable whether he can ever prove $12,000 in damages, assuming you can bridge the gap of liability. Is that your lowest figure now?

MR. GOLDSTEIN: I think that is a fair figure.

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MR. STEARNS: That is an absurd figure, if I may say so.

MR. GOLDSTEIN: You always may say so.

MR. STEARNS: Here is a man who made between November of 1972 -- reported income of $148 in a period of two years.

MR. GOLDSTEIN: So what?

MR. STEARNS: Here is a man with a history of complaints about pains in his back, back to 1967.

MR. GOLDSTEIN: There were no complaints about pains in his back.

MR. STEARNS: I will read them, I will read them when the doctor gets here. We will go through the whole thing.

MR. GOLDSTEIN: Fine.

MR. STEARNS: And this is a guy who the man he is working with says that his accident never happened. The bosun said the man said something to me about pain in his back, not that he had had an accident. He doesn't tell the bosun, he doesn't tell the chief mate, he doesn't tell the doctor at the New Orleans hospital, he doesn't tell anyone --

THE COURT: I am not going to press this matter. I am not going to waste my time.

MR. STEARNS: I won't consider settlement for that

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figure.

THE COURT: Let us go ahead. How long are you going to be on redirect tomorrow?

MR. GOLDSTEIN: Of the plaintiff? I don't think very long.

THE COURT: How long is not very long -- half an hour?

MR. GOLDSTEIN: Twenty minutes, a half hour at the most.

THE COURT: Put that down. We will see how close it comes.

MR. GOLDSTEIN: I may surprise you, Judge.

THE COURT: You might surprise me by going ten minutes, I suppose.

MR. GOLDSTEIN: That is what I mean.

THE COURT: It is very unlikely.

MR. GOLDSTEIN: I may surprise you by not asking him any questions.

THE COURT: That wouldn't surprise me either.

MR. GOLDSTEIN: Because as a matter of fact I think the plaintiff held up very well, and I don't know what there is to really go over.

THE COURT: I think you are overoptimistic if you say that. It is not the impression which it seems to me any

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we'll

reasonable juror might think of that kind of operation, if I can say so. He gives a very incomplete, inadequate effect to me, and I don't know why it isn't the same way to each of the jurors. But I am not deciding it.

MR. STEARNS: Your Honor, I will say this. Unless--and I have read these depositions--unless there is something in there that I don't see, unless there is something about procedure, out of this man who was lifting his third machine --

THE COURT: Get your deposition and let me see it now.

MR. STEARNS: I don't see that there is any basis for any liability.

THE COURT: Read the part you say is pertinent.

MR. STEARNS: This would be Mr. Schmidt. He gives a description --

THE COURT: Get right to the nut of it.

MR. STEARNS: (reading)

"Question: I have told you, have I not, Mr. Schmidt, that Leroy Porss" -- this is a man I subpoenaed off the ship; I never talked to him about most of this deposition --. "claims that while engaged in lifting the butterworth hose from one of the tanks on the ship on June 8, 1971, that you and Mr. Francis Wherrity both, during the lifting operation,

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suddenly let go both the hose and the line, causing him to bear full weight of the hose and the machine.

"Mr. Goldstein: Objection. It is not our claim.

"Mr. Stearns: It is one of the things that has been said in the deposition, is it not?

"Mr. Goldstein; Not in that way.

"Mr. Stearns: All I can say is it is my understanding of the claim.

"Mr. Goldstein: You are entitled to have your understanding, but I will object and raise the objection at the time of the trial.

"By Mr. Stearns:

"Question: Did that occurrence happen?

"Answer: No, it never did happen.

"Question: Did you ever see Mr. Porss at any time during the period that you were a shipmate with him on the Overseas Aleutian in early June 1971, did you ever see him yanked off his feet while he, you and Wherrity were handling the Butterworth hose?

"Answer: No."

Mr. Goldstein was on for forty pages trying to break that testimony. He never broke it down.

MR. GOLDSTEIN: So says Mr. Stearns.

THE COURT: Wait a minute. I am talking to Mr.

wc 13

Stearns.

You say it wasn't broken down as a result of that elaborate cross-examination?

MR. STEARNS: No, I am talking about -- this is Mr. Schmidt's testimony.

THE COURT: Mr. Schmidt I mean.

MR. STEARNS: Mr. Schmidt said it never happened, and Mr. Goldstein tried to cross-examine him.

THE COURT: That is what I say. You say he did not break down Schmidt's testimony?

MR. STEARNS: Not at all.

THE COURT: Well, there you are. I think you had better think more than once, counselor.

MR. GOLDSTEIN: There we are what?

THE COURT: I am not kidding you at all.

MR. GOLDSTEIN: Judge, you mean because Mr. Stearns has made a statement, so that's it?

MR. STEARNS: Read it.

MR. GOLDSTEIN: I read it. Stop waving it in my face, please.

Judge, I have been spending the afternoon while Mr. Stearns has been plowing through Mr. Poiss checking off that deposition. And I have gone through that deposition with a fine tooth comb. I am prepared to read substantial

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portions of that.

THE COURT: That is going to take some more time.

MR.GOLDSTEIN: I have never been considered so stupid that I read major portions of depositions which refute my client's case.

The mere fact that Mr. Stearns has decided that I have not broken Mr. Schmidt does not mean a hill of beans to me, Judge. That is his problem.

MR. STEARNS: Mr. Goldstein, on a different topic --

THE COURT: No.

MR. GOLDSTEIN: That is his problem.

THE COURT: No, it is your problem too. You apparently can't even imagine that his testimony might be believed by the jurors.

MR. GOLDSTEIN: It may well be believed. I can also imagine that if the jury believes Mr. Porss and does not believe Mr. Schmidt when he denies that the accident ever happened, does not believe that he was telling the truth, then I can see myself getting $35,000 to $40,000 in this case.

THE COURT: I think you are ill-advised, counselor. I am not going to spend any more time.

MR. GOLDSTEIN: That may well be.

THE COURT: You are willing to take how much,

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twelve?

MR. GOLDSTEIN: Twelve-five.

THE COURT: Has that gone up or did you say that before?

MR. GOLDSTEIN: No, twelve-five. That is the figure I said before.

THE COURT: I want to be certain what we are going to do tomorrow before we break up.

MR. STEARNS: You are going to be twenty minutes on redirect?

MR. GOLDSTEIN: No, he said a half hour. You said you hope it would be twenty minutes.

THE COURT: A half an hour. If it is a half an hour, I will be greatly surprised.

MR. GOLDSTEIN: I think I will be too, Judge. I think you will be surprised because it may be substantially less than that.

MR. STEARNS: Your Honor, I am going to ask again tomorrow morning to be permitted to cross-examine.

THE COURT: About intent? What questions can you ask which go to that, really?

MR. STEARNS: What I was attempting to do was ask him what I think is the perfectly proper question of whether or not he believed --

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THE COURT: What difference does that make?

MR. STEARNS: Because this is some evidence of what really happened, what his belief and impression are. He is the only one there.

THE COURT: No. There were three of them there. Were there three? I don't know how much you can get out of it by asking an opinion. It is not a situation in which an opinion bit of testimony, no matter how qualified he might be, is particularly helpful.

MR. STEARNS: What I am driving at is, if this case goes to the jury where the inferences are no more substantial that this was a negligent act than that it was an intentional act, there is a failure of proof and I will so argue to the jury.

THE COURT: It may be, but I don't see how it can get there now on an intentional basis. I don't see how you can get out anything from the plaintiff as to what he believes.

MR. STEARNS: Your Honor, before Mr. Goldstein got up, I don't know whether the reporter got the initial beginning of his answer, but I think it started with "I don't, but."

THE COURT: Well, there are a lot of "I don't knows" sprinkled all through the testimony on cross-examination,

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no doubt about that, and many on the direct, no doubt about that.

MR. STEARNS: But, you see, I asked him flat out, Do you think this was deliberate?", and he said, "I don't know, but" -- and was going to suggest in what fashion he thought it was deliberate.

MR. GOLDSTEIN: Beautiful.

THE COURT: Did somebody stop him?

MR. STEARNS: Yes, Mr. Goldstein, doing his job.

MR. GOLDSTEIN: Judge, you have now heard a straightforward opinion by Mr. Stearns.

MR. STEARNS: That is it, that is opinion.

MR. GOLDSTEIN: Which I totally reject.

THE COURT: Well, you can reject it.

MR. GOLDSTEIN: You know, the fact that Mr. Stearns makes a statement, Judge, about what he thinks Mr. Porss is going to say or was going to say really does not amount to much, Judge.

THE COURT: I don't think he is attempting to do that. He is endeavoring to ask the question.

MR. GOLDSTEIN: I don't know what else he is attempting to do.

MR. STEARNS: I thought I heard him say, "I don't know, but" -- and it was my impression that the man was

going to launch into what he thought was a cunning suggestion that maybe he did go to hurt him.

THE COURT: Can you state where this question is? Was it the last one?

MR. STEARNS: It would not be the last question, but it would be --

THE COURT: Next to the last?

MR. STEARNS: Very close.

THE COURT: Mr. Reporter, would you see if you can find that.

(Record read)

MR. STEARNS: I guess I was mistaken.

THE COURT: I think you were mistaken.

We will have thirty minutes of rehash, probably, unless you adhere strictly to redirect, which will contain only matters submitted on the defense.

MR. GOLDSTEIN: I will submit, Judge, that I think that Mr. Stearns' cross-examination was exceptionally complete and probably opened up every conceivable door for me for redirect examination.

THE COURT: I don't agree with you fully. I don't know how many doors I think he opened.

MR. GOLDSTEIN: I don't think that any of them really mean very much, Judge.

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THE COURT: All right. I will pass on the question when it comes, and if there is an objection that it is not redirect, I shall have to pass on it.

MR. GOLDSTEIN: Fair enough.

THE COURT: And I am not too liberal on what is redirect, I must tell you that, and I don't think any judge should be. After that, what are we going to do tomorrow?

MR. GOLDSTEIN: I am going to read parts of two depositions.

THE COURT: Do you want to read depositions tomorrow, Mr. Stearns?

MR. GOLDSTEIN: I am also going to read the interrogatories and answers to interrogatories.

THE COURT: Do you know which ones you are going to read?

MR. GOLDSTEIN: All of them.

THE COURT: I want you to sit down either now or early tomorrow morning and indicate which ones you are going to read, to counsel, and to see if there are any of them to which he objects.

MR. GOLDSTEIN: He can't object, Judge.

THE COURT: Wait a minute. Whose answers are they?

MR. GOLDSTEIN: They are answers to my interrogatories.

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THE COURT: I thought they were something else. All right.

Yes, he can object.

MR. GOLDSTEIN: He can't object to my reading his answers to my interrogatories.

THE COURT: Yes, he can.

MR. GOLDSTEIN: And I can't object to his reading mine.

THE COURT: I think you are wrong. He can object if the question is irrelevant. Did you ever hear of that?

MR. GOLDSTEIN: Irrelevancy, yes.

MR. STEARNS: Incompetent.

MR. GOLDSTEIN: Irrelevancy.

MR. STEARNS: Immaterial.

MR. GOLDSTEIN: Irrelevancy.

THE COURT: He has a right to object. What I want you to do is to indicate to him which ones you are going to read.

MR. GOLDSTEIN: I am going to read them all.

THE COURT: He is going to read them all. So be ready, counselor. I don't want any fooling around on that. Then after that what else are you going to do?

MR. STEARNS: If he will rest, your Honor, I will read the rest of the depositions.

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MR. GOLDSTEIN: I will rest subject to Dr. Seaman coming in Thursday morning, coming in Thursday morning.

THE COURT: I don't know where that leaves us. Is that going to leave us with a motion?

MR. GOLDSTEIN: He can make his motion before Dr. Seaman, because Dr. Seaman has nothing to do with what his motions would be on.

THE COURT: Oh, I don't know. There may be something about damage claims, and on that will you please state on the record, is there any claim here, Mr. Goldstein, for past lost wages?

MR. GOLDSTEIN: Yes, there is.

THE COURT: What period and how is it arrived at?

MR. GOLDSTEIN: There is a pretrial order. It is in the pretrial order. My recollection is $7,000.

THE COURT: All right. Is there any claim for future suffering and disability?

MR. GOLDSTEIN: Yes.

THE COURT: Is there any claim for past suffering and disability?

MR. GOLDSTEIN: Yes, there is.

THE COURT: Are there any figures?

MR. GOLDSTEIN: I don't believe there are.

MR. STEARNS: In addition to the master's

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certificate from the Longview Victory, I have the medical logs.

THE COURT: You may offer the medical logs.

MR. STEARNS: Do I need to bring the medical logs from the law firm or the company to authenticate them? It is a photocopy.

MR. GOLDSTEIN: Where are the original logs?

MR. STEARNS: I have copies.

MR. GOLDSTEIN: You mean these are the medical logs of the Longview Victory?

MR. STEARNS: Yes.

MR. GOLDSTEIN: Let me look at these things.

THE COURT: Have you got them here?

MR. STEARNS: The reason this is relevant is that the man said he got off the Longview Victory because of a pain in his back.

THE COURT: All right, that should be admissible.

MR. STEARNS: What do you require?

MR. GOLDSTEIN: I require looking at them.

MR. STEARNS: It is on my desk.

THE COURT: He wants to see them, but that should be done.

On the pretrial order, date of accident to November 1972 --

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MR. GOLDSTEIN: That is when he got on his first ship after the accident.

THE COURT: How did you base that? How did you get $14,000, counselor?

MR. GOLDSTEIN: That is about fifteen months, Judge.

THE COURT: How did you get that, no matter how many months it is?

MR. GOLDSTEIN: As I recall, it was $900 a month, Judge.

THE COURT: $900 a month?

MR. GOLDSTEIN: Yes.

THE COURT: Is that what he said yesterday?

MR. GOLDSTEIN: Yes.

THE COURT: Well, that is a matter for you to check if you want to dispute it.

Are you going to claim traveling expenses to the Public Health hospital?

MR. GOLDSTEIN: I may, Judge. I really don't think so. I am not quite sure about that.

THE COURT: I don't think it is relevant.

MR. GOLDSTEIN: It is a permitted item.

THE COURT: Who said so? Who says that? He gets a free ride.

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MR. GOLDSTEIN: That isn't for the treatment. That is for the transportation to the nearest Public Health Service.

THE COURT: I know it isn't. But he goes there to get the free treatment.

MR. GOLDSTEIN: That is right. But it stil cost him money to go there.

THE COURT: Maintenance and cure, you haven't yet told us how much that was. I said you were to get it for today.

MR. GOLDSTEIN: Judge, I have it right outside.

THE COURT: Well, go get it, please.

What is the claim for maintenance and cure?

MR. GOLDSTEIN: The paid maintenance and cure, Judge.

THE COURT: I asked you what is your claim. Didn't you ask how much you had been paid?

MR. GOLDSTEIN: My claim is $8 per day.

THE COURT: That is the usual contract, isn't it?

MR. GOLDSTEIN: Right. From August 6, 1971, which is the last day that they paid maintenance and cure, to the time --

THE COURT: What date?

MR. GOLDSTEIN: March of 1972.

THE COURT: What date in March?

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MR. GOLDSTEIN: I don't know the exact date, Judge. It was a day that he was marked fit for duty, and he says that it was March 1972.

THE COURT: Is that the final date?

MR. GOLDSTEIN: That is the date that he was marked fit for duty.

THE COURT: When did he reach his maximum cure? What is the claim?

MR. GOLDSTEIN: I don't know that he has ever reached his maximum cure. He still gets the pain, it returns, he has the weak back, he has an unstable back.

THE COURT: Of course, alleviation is not treatment. That is, it is not something that gives rise to maintenance and cure.

MR. GOLDSTEIN: That is correct, Judge. That is why I say that he is entitled to maintenance and cure only until the time that he was declared fit for duty in March of 1972, and this is from August --

THE COURT: Do you have a different date, counselor?

MR. STEARNS: What happened was this: He was declared fit for duty after a perfunctory bit of treatment at the Public Health Hospital, I think on August 6, 1971. But he persisted, I think consistent with what were then his

work patterns, he didn't go back to sea and he went back to the hospital some period of time later.

THE COURT: Have you got any other medical opinion to contest this, this second not fit?

MR. STEARNS: Yes, yes, in view of the fact that the man never had substantial complaints, in view of the fact that he does have a prostate infection of ten years standing, which is, as I understand it, as he admits, the cause of back pain.

MR. GOLDSTEIN: Who admits?

THE COURT: Wait a minute. Go on, Mr. Stearns.

MR. STEARNS: The plaintiff.

THE COURT: Keep quiet.

MR. STEARNS: If there were a second period of not fit for duty -- and according to the Public Health there was -- this was (1) either brought on by exaggeration of symptoms by plaintiff himself or (2) was the product of a chronic condition that was not really causally connected with whatever he says happened.

THE COURT: What do you say was the maximum cure date?

MR. STEARNS: August 6, 1971, when he was first declared --

THE COURT: Have we got to send this thing to the

we 27

jurors?

MR. GOLDSTEIN: Yes.

MR. STEARNS: I would consent that it not go to the jurors.

MR. GOLDSTEIN: No, I would think that it does go to the jury.

THE COURT: You will have to submit requests to charge, counselor, and you will have to get them in tomorrow.

MR. GOLDSTEIN: I will, Judge.

THE COURT: You choose your method, you choose your requests too. That is involved.

You say we will have the doctor here Thursday morning?

MR. GOLDSTEIN: Yes, sir.

THE COURT: In all likelihood, maybe we can get -- I don't know yet -- a set of summations on Thursday afternoon. Then we will have to go over until Monday. I told you that. You or your client, I don't care which, ought to have to pay something for this delay in the administration of justice. However, I suppose you can't help it and it is one of those miserable situations which do occur. Now our plan for tomorrow is all set.

MR. GOLDSTEIN: Yes, sir.

(An adjournment was taken.)

- - -

eb1a 1

LEROY FORSS

-against- 72 Civ. 1600

MARITIME OVERSEAS CORPORATION

April 9, 1975
10:00 a.m.

(In the robing room.)

THE COURT: First, and this applies to the cross-examination question attempted whereby Mr. Stearns attempted to ask the plaintiff his opinion as to what these other two employees were going to do -- it is my ruling as follows: I shall have to sustain the objection. It seems to me that in order to prove any intent, there must be some tangible, observable phenomenon of some kind. Therefore, I have to sustain the objection.

Now, the second thing is this: -- and this applies more to Mr. Goldstein -- yesterday afternoon, as I recall it -- I don't know the exact verbiage -- but at one point your plaintiff-client said he would answer no more questions. Whether he referred simply to the line of questions or whether he referred to any questions, I don't know. In any event, it is just as bad, one as the other, and I want you to warn him and I want you to warn him that if that continues, I may be compelled to consider a motion to strike his direct testimony. I think that's it.

law. By the time it arises, and I hope it will not arise, I shall have some cases. I think that's the law. And certainly you can't expect to continue a case if the plaintiff himself will not answer questions. That's all I have.

Now, the proceedings as I understand it: You are through, aren't you now, with your cross, Mr. Stearns?

MR. STEARNS: Well, I was planning, at the time I was asking the questions, to go ahead with this question of intention. There are probably a few things that I might think to ask him.

THE COURT: I thought you had concluded.

MR. STEARNS: I will conclude, sir.

THE COURT: You concluded now?

MR. STEARNS: Yes.

THE COURT: Now, then, there will be redirect, as we stated yesterday, by Mr. Goldstein.

MR. STEARNS: Yes.

THE COURT: And what do we have then?

MR. GOLDSTEIN: The two depositions and the defendants --

THE COURT: You have some depositions to read.

MR. GOLDSTEIN: Yes. I want to read parts of two depositions.

THE COURT: Now, after that, are you willing to

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claim 3

stipulate that the defendant proceed with its case?

MR. GOLDSTEIN: Yes, I am.

MR. STEARNS: At that point, you will rest --

THE COURT: I can't compel you to do so.

* * * * * * * * * * * * *

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A N G E L O A N T O N I O U, having first been duly sworn by Alice Pizzo, a Notary Public of the State of New York, was examined and testified as follows:

"EXAMINATION BY

MR. CORWIN:"

Mr. Corwin is an associate of the law firm of Haight, Gardner, Poor & Havens, the attorneys for the defendant.

THE COURT: Yes.

"Q Would you state your name, please?

"A Angelo Antoniou."

THE COURT: You don't have to put in his residence.

ebla 14 "Antoniou"

MR. GOLDSTEIN: Page 3, line 2.

"Q About how many years prior to June of 1971 had you served on tankers?

"A A good six years.

"Q Were you acting as boatswain on those tankers?

"A For the most time.

"Q What are your duties or responsibilities as a boatswain? What does your job consist of?

"A Assisting all the deck hands and cooperate with my chief officer and we decide what we are supposed to do on the ship, the job.

"Then I go and perform all the jobs. I tell each man what to do, how to do it and where they got to go. I keep an eye on them, too."

Line 18:

"Q Do you recall when you served on the OVERSEAS ALEUTIAN?

"A Yes.

"Q When was that?

"A January the 4th.

"Q What year was that? Do you recall?

"A 1971.

"Q How long did you stay on board?

"A I stayed there from January 4th to July 9th.

Line 15 "Anterior"

"Q In what capacity were you serving on board?

"A Boatswain."

Line 14:

"Q Was it a freighter of some kind?

"A Tanker."

MR. STEARNS: Referring to the OVERSEAS ALEUTIAN.

THE COURT: It refers to the OVERSEAS ALEUTIAN.

MR. GOLDSTEIN: Obviously. Everything does.

THE COURT: Well, all right. Then say so then. Not everything, but in this case it does, on this question.

"Q How many tanks did the vessel have?

"A Fifteen tanks. Five wings, five centers. That is fifteen all together.

"Q When you say five wings, that is five on each side of the ship?

"A Each side, right.

"Q What is the layout on the ship? Is all the machinery and the house aft or is there --

"A The house is amidships."

MR. GOLDSTEIN: Your Honor, may I explain to the jury what "amidships" is?

THE COURT: There is no testimony here. You read the record, that's all, counsel.

MR. GOLDSTEIN: Mr. Stearns, can we agree that

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ebim L. "Antoniou"

"Q Did he work on the OVERSEAS ALEUTIAN while you were on board the vessel?

"A Right.

"Q Do you recall what job he had, what his capacity was? Was he a seaman?

"A His job was an A.B. seaman.

"Q You mentioned the butterworthing before. What is butterworthing?

"A Butterworthing is a machine that weighs about twenty pounds, approximately, and it has a hose on it, a rubber hose, seventy-five foot long, connected to the machine.

"We get ready and we put the machines down and certain cargo -- it's a different cargo, different oil, different type. If it's a heavy oil, we start it from five feet every half an hour or every hour. It depends what the cargo is, what type.

"Then every half an hour we slack the machine another ten feet. That makes fifteen. Another half hour another ten feet. That makes twenty-five. Another half an hour another ten feet. That makes thirty-five.

"The last drop is at forty-three feet. We cut a little bit back because you can't go deeper than that. You can't go forty-five because it hits the bottom of the

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ship when machine is not operating any more.

"I wait to the time comes up and I shut the machine off. Before I shut the machine off, I have a hose aft. I call them bleeders. You open this valve first before you touch any machine, let the pressure go out, carry all the pressure off the line.

"I have to look that -- if the man open the right valve; I have to look at it. It's my part of the job. If I see the hose running properly, I shut the machine off, and I wait at least three, four minutes to let the first machine take all the pressure off, all the water off, the hose to be more light, and we pull them up.

"Q Mr. Antoniou, you're talking about a machine, a butterworth machine, right?

"A Yes.

"Q What does that machine do inside the tank? What is it's function?

"A That machine got four different directions. They go around like this (indicating). They go around this way (indicating). They hit all the direction automatically. Probably it goes two minutes this way, two minutes that way, two minutes this way circulates around so it hits all the tanks around (indicating).

"Q When you say hits all the tanks, what is happening

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cblm 20 "Antoniou"

inside the tank while this machine is in there?

"A Washing.

"Q What is it washing? How does it wash?

"A You keep hitting.

"Q What is hitting? In other words, what does the machinery actually do? It is spraying something?

"A Spray. That is right. Like a nozzle. Like a fire hose. They have two nozzles on the machine and the water comes out different directions, circulating.

"Q What kind of water is it?

"A Salt water.

"Q Is it cold, hot?

"A Usually we use hot water.

"Q Did Mr. Porss help you in this butterworthing operation while you were a boatswain?

"A Yes. Mr. Porss, he show up the first day"--

Line 21:

"Q Did you ask him to help you with the butterworthing or was this part of his duties?

"A When we start butterworthing, washing the tanks, I see this man. Usually I have three men to do this job.

"Q What does each man do as part of his duties?

"A Each man gets in position when the machine is ready to come up.

ebla 21 "Antoniou"

"Q Let's go back a little bit. You have talked about the machine being inside the tank.

"A Right.

"Q How does it get inside the tank?

"In other words, is there a hole of some kind?

"A Right. Each tank have five holes in it.

"Q Five holes?

"A Yes, five.

"Q Is there a name for those holes?

"A They call them butterworth plates.

"Q The plate is a plate that goes over the hole; is that right?

"A Over the hole."

Line 24:

"Q What time of day was it that Mr. Porss first started helping you or working with you?

"A That was the third day after he come on board the ship."

Line 9:

"Q You were in the process of cleaning the tanks at this time when he came to help you?

"A He come out to help me. I call him up, the man on the watch, and my deck man -- deck worker -- including me, and was everything lined up and I started butterworthing.

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"Q Do you recall what tank you were butterworthing?

"A Three center.

"Q You mentioned there are five holes.

"A Right.

"Q Or five plates.

"Do you put just one machine inside each tank?

"A Each hole.

"Q You put a machine in the holes?

"A Yes.

"Q How many machines do you put inside?

"How many can you operate at once?

"A You can operate four machines. You can operate two, if you want to.

"I was operating four machines at that time, two each side. I was butterworthing the number three center.

"Q Mr. Porss was assisting you in this operation, the butterworthing?

"A Not assisting me. He had to work.

"Q Working for you?

"A I am the one being assisted."

MR. GOLDSTEIN: If your Honor please, may I have some water?

Line 17:

"Q Let's concentrate about one machine.

"You have a hole on the deck on the ship; is

that right?

"A Right.

"Q You put the machine down through this hole; is that right?

"A Yes."

Next page, line 2:

"Q In other words, how do you lower the machine in?

"A We lower the machine with a hand -- we lift the machine up and put them through the hole. It depends how many feet you want to go. I was going five feet at the beginning.

"Q How do you know how many feet you are lowering the machine in? How can you tell it's going in --

"A By marks.

"Q Where are those marks?

"A Each hole has a mark, a wide strap. The two front ends, they got five feet. One end got five feet; seventy-five foot hoses. You start from five and then you head fifteen.

"Q The next mark after five is fifteen?

"A Fifteen. Every ten feet after that.

"Q There is a mark at each ten foot distance?

"A It's marked with a wide strap. You never miss it, with the number on it."

eb1m 24 "Antoniou"

Page 15, line 6:

"Q Do you recall what had been the cargo in the tanks you were cleaning that day that Mr. Porss was helping you with?

"A There was crude oil.

"Q How long do you leave the butterworth machine at each of these levels that you indicated before when you are cleaning a tank that had contained crude oil?

"A All together?

"Q No. You mentioned before that you lower the machine in states.

"A Five feet.

"Q The first stage is five feet?

"A Half an hour.

"Q Half an hour to each stage?

"A Right.

"Q How many times would you lower it before the machine gets to the bottom?

"A Four times.

"Q Half an hour at each stage?

"A Right.

"Q What do you do when the machine is at the bottom of the tank? What is the procedure then?

"You have got the machine at the bottom and it

cbln 25 "Antoniou"

has finished its last half hour.

"What is the next thing that you do?

"A The next thing I am doing, I am opening the bleeder, take the pressure off the line."

Line 14:

"Q Then what do you do?

"A Then I shut the valves off.

"Q What valves are those?

"A All the valves for each machine that is on.

"Q The machines are the butterworth machines?

"A That is right.

"Q How many machines were you operating this afternoon?

"A Four.

"Q You shut all four off at the same time?

"A The same time, yes.

"Q What do you do then?

"When I say 'you,' I mean you and the three men that were working under you.

"A I order the men to shut the valves off. I am checking if the valve is complete off, because I am responsible for this job.

"Then I wait two, three minutes, let the water come out to complete the hose --

"Q What hose is that?

"A Butterworth hose.

"Q What is that hose between? What is at each end of that hose that you are talking about that you let the water drain out of?

"A The one that is attached to the machine.

"Q The one attached to the butterworth machine?

"A Right. As soon as they drain, you can tell the hose is empty. The hose is clamped right away.

"Q It flattens out?

"A Flattens out. Then we start pulling up.

"Q When you say "we," how many men pull the machine up?

"A Three men.

"Q They are pulling it up through the hole?

"A Through the hole.

"Q Of the three men, what are their different jobs?

"A Any man, he can get the center of the tank -- the hole and get the hose in one hand and the line in the other hand.

"Q This is the man in the center?

"A That is right.

"Q Where are the other two men?

"A One man stay each side of the man in the center.

ebim 27 "Antoniou"

He gets first and they help him the same time (indicating).

"Q Indicating an upward motion with two hands?

"A That is right. They hold because he automatically - he let it go and he gets another bight.

"Q The man in the center pulls up and the two men on the two sides --

"A They help him, too.

"Q What are they pulling on? You are indicating with two hands. What is in each hand?

"A Each man got the hose in his hand and the other man have the line.

"Q How big is that line?

"A The line is two and a half inches.

"Q What is the line made of?

"A Manilla.

"Q What is it attached to?

"A Attached to the machine.

"Q How big is the hose, the hose that you mentioned?

"A Seventy-five foot.

"Q About how big around is that?

"A Two and a half inches.

"Q They are pulling those two things up?

"A Right.

"Q Who keeps track of the time as to when the machine

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is supposed to be moved?

"A I. The boatswain. That is me.

"Q You know each time when the machine is going to be moved?

"A That is right."

Page 20, line 3:

"Q Can two men pull up the machine at the same time?

"A It's impossible."

Page --

MR. STEARNS: Your Honor, this is so out of context. I would ask that the next question be asked before the context is lost.

THE COURT: Yes. I think it should be read in.

MR. GOLDSTEIN: If your Honor please, I object to this. I have the right --

THE COURT: You can object as much as you please but I'm going to direct it, counsellor.

MR. GOLDSTEIN: That it be read now out of turn? He has the right to read it after I finish.

THE COURT: That may be, but I am directing because of context, that it be read now. Proceed accordingly.

MR. GOLDSTEIN: Will your Honor note my exception to your Honor's direction.

ebbm 29 "Antoniou"

THE COURT: I note your exception but will you please do as I have directed.

MR. STEARNS: Page 20, line 3:

"Q Can two men pull up the machine at the same time?

"A It's impossible.

"Q Just speaking about the machine itself, can you pick that up by yourself as you stand there, if I had the machine sitting on the floor next to you?

"A Right.

"Q Can you pick up two of those machines at once?

"A Yes.

"Q One in each hand?

"A Yes.

"Q About how tall are you?

"A Five six.

"Q How much do you weigh?

"A One thirty-five.

"Q Would you have any trouble picking up that machine?

"A Not at all."

MR. GOLDSTEIN: Now that isn't out of context.

Do any of those questions mention the hose that those men were picking up beside the machine?

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THE COURT: You will please continue to read what you intend to read.

MR. GOLDSTEIN: Thank you. May I continue according to the rules of the Court?

THE COURT: Well, we will look at the rules of the Court.

MR. GOLDSTEIN: Yes, I would appreciate your Honor doing that.

THE COURT: Well, one section only, when part of a deposition is offered in evidence by a party, an adverse party, then I require him to introduce any other part which ought to be considered with the part introduced, and any party may introduce any other parts.

Now, what do you want to know?

MR. GOLDSTEIN: I want to know if I am allowed to read this deposition in the way that I am entitled to read it and if --

THE COURT: Not entirely. You are subject to the rule which I just read to you.

MR. GOLDSTEIN: May I see that rule?

THE COURT: Yes, of course, you may see it.

MR. GOLDSTEIN: Thank you.

THE COURT: Show it to counsel, too.

(Pause.)

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MR. GOLDSTEIN: Will your Honor kindly read the note again? Does it say anywhere that I am to be stopped in the middle of my reading of a deposition by another attorney for another party who insists at that time that I read what he says I should read?

THE COURT: That's the way I interpret it, counselor.

MR. GOLDSTEIN: That he can interrupt me at any time and read what he wants in at the same time?

THE COURT: He didn't do that. He asked you to read it and you didn't and then he read it, so I am going to allow it.

Now, move on.

MR. GOLDSTEIN: May I continue at this point, sir?

THE COURT: Yes. Go on.

MR. GOLDSTEIN: Thank you.

Page 23, line 24:

"Q Of those three men, who is the one that has the hardest job of the three people?

"A They divide it. You don't just hold the line or the hose. You are supposed to lift the machine up, the whole thing at the same time, but the center one always gets a little bit more weight; not too much."

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MR. STEARNS: Excuse me. I have lost you. 247? Thank you.

MR. GOLDSTEIN: Then over to page 26, line 13:

"Q During the time Mr. Porss was working under you that day, what jobs did he do?

"You mentioned three men would lift the machine.

"Of the three different jobs that you mentioned, in other words, the three men, there is a man in the center and a man on each side.

"Did the men rotate these jobs?

"A Not exactly. I have to tell them -- they are supposed to take turns. Each one on each machine every time pull the machine up. You can't do one man being in the center all the time. The next man gets turn, another man gets turn. So I have to do the most time myself.

"When we were resting time, we sit over there. I have almost half an hour. I saw this man was walking back and forth. So I call him up. I say come over here. Sit down. You don't have to walk back and forth."

THE COURT: Is there any agreement as to whom this man refers to?

MR. STEARNS: It's Mr. Porss.

MR. GOLDSTEIN: I assume it's Mr. Porss.

THE COURT: All right; counsel agree.

MR. GOLDSTEIN:

"I say come over here. Sit down. You don't have to walk back and forth. I want to explain to you something how we can operate here so you can get in down there and lift that machine up once in a while.

"He turned around and say 'My back hurts me.'

"Q Who was that man?

"A That man was Leroy Porss.

"Q About time was that?

"A That was 9:30.

"Q Did he continue to work for the rest of the time?

"A He was continued to work and I asked him further questions, 'How come your back hurts you?'

"The man tells me 'My back hurts me.' I don't force him to do anything, you know. So I let him do what he was doing before."

Page 28, line 3:

"Q Did you ask Mr. Porss or Leroy if he wanted to Butterworth the following day?

"A Yes."

Line 9:

"Q The watch did?

"A It's not my job to call anybody. I tell the man to go call them but I am not supposed to be personal.

"Q What happened then?

"A I send the man down and tell him, 'Don't forget, wake up the twelve to four watch. Report 8:00 o'clock to the butterworthing.'

"So the man come back and he say to me -- this man, he tell me his back bothers him. I said, 'Which one?' So he pointed to his name. So I go back aft, back in his quarters personally. I saw the man who was laying on the bed."

MR. STEARNS: Your Honor, for context again, may I read the next few questions for you, questions and answers?

THE COURT: Yes. Either that, or a stipulation that the man is the plaintiff, is not enough?

MR. GOLDSTEIN: There is no question about it

THE COURT: Well, all right, stipulate then.

MR. GOLDSTEIN: I stipulate it.

THE COURT: It's so stipulated.

MR. STEARNS: Well, then, I won't read at this point.

THE COURT: All right. Go ahead.

MR. GOLDSTEIN: Page 32, line 15:

By the way, I might add, if your Honor please, this is my examination. We have finished Mr. Corwin's

examination and we are now on my cross-examination of this witness.

THE COURT: All right, this is cross by you. Go ahead.

MR. GOLDSTEIN:

"Q You said that you had sailed six years before 1971 mostly as boatswain?

"A Yes, sir."

Line 25:

"Q You mentioned six years before 1971.

"MR. CORWIN: On tankers.

"THE WITNESS: Tankers, right.

"Q That was mostly as a boatswain on tankers?

"A Yes, sir.

"Q Actually how many tankers did you sail on during that six-year period?

"A How many ships?

"Q Yes, how many ships.

"A Sometimes like I stay one every two years in the City Service.

"Q Were you boatswain on that one?

"A No. I was a deck maintainer when we operate the butterworthing system, nobody else.

"Q You were a deck maintenance man?

"A Right.

"Q What other ships did you sail on?

"A Coastwise.

"Q Do coastwise ships have a butterworthing system that they use?

"A Yes, sir. All the ships."

Page 34, line 23:

"Q How many ships did you actually sail on as a boatswain?

"A About four.

"Q Can you name those four ships for me?

"A Yes. One that was at -- they call them Tagger Line owned by 'Cacorus.'

"Q He is a Greek shipping owner?

"A Yes. He is a Greek shipping owner; American, American flag.

"Q Of an American flag?

"A Yes.

"Q You sailed on four of his ships?

"A No. I sailed on that ship.

"Q One ship?

"A Yes.

"Q How long did you sail as boatswain on that one ship?

"A On that ship I was six months.

"Q As a boatswain?

"A Yes."

Page 37, line 11:

"Q What other ships did you sail on as a boatswain during that six-year period on tankers?

"A I was on City Service, Miami.

"Q That was the two years that you were a deck maintenance man?

"A No, after I got off deck maintenance.

"Q How long were you on that ship as a boatswain?

"A Two and a half months."

Page 38, line 8:

"Q Can you tell me at this time as you sit here how many times you butterworthed the whole ship?

"A The whole ship --

"Q That is during the two and a half months.

"A To tell you the truth, I think one time, the whole ship."

Page 39, line 5:

MR. STEARNS: Your Honor, I object to -- well, I withdraw the objection. Go ahead.

THE COURT: Line 5.

MR. GOLDSTEIN:

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"Q How many other ships did you sail then as a boatswain on tankers that you can tell us about now?

"A How many ships?

"Q Yes, that you can tell us about now.

"A I was on the ALEUTIAN seven months."

Page --

THE COURT: Do you want to put in the next question?

MR. GOLDSTEIN: No, sir. I will leave that for Mr. Stearns.

THE COURT: I think it's fair to put it in now, counsellor.

MR. GOLDSTEIN: Is your Honor asking me to read it?

THE COURT: Yes, I am. In plain language, I am.

MR. GOLDSTEIN:

"Q That was as a boatswain?

"A Yes. I was in the Arctic many times, overseas two months."

Page 43, line 8:

"Q You did the job with the three men all the time?

"A Yes."

THE COURT: Is this referring to the job on the ALEUTIAN? Is that agreed?

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MR. STEARNS: That's agreed as far as I'm concerned.

THE COURT: Are you agreeable to that, counsellor?

MR. GOLDSTEIN: Yes, sir.

MR. STEARNS: And I agree further that this is the reference to the lifting of the machine out of the tank.

MR. GOLDSTEIN: I don't agree to that, sir.

THE COURT: You don't agree to what?

MR. GOLDSTEIN: I don't agree that he lifted at the time with three men.

THE COURT: Well, do you agree to the testimony? You are not agreeing to the facts.

MR. STEARNS: Your Honor, all we are discussing is what this job or the job refers to.

THE COURT: That's right. This job is the only reference there.

MR. GOLDSTEIN: If your Honor will read the page before, and your Honor will show me the place that we are talking about the lifting of it and not just doing the job, period, then I will agree.

THE COURT: I'm not going --

MR. GOLDSTEIN: Your Honor won't find it.

THE COURT: I'm not going to look around at all. Go ahead with your questions.

obln 4D "Antoniou"

MR. GOLDSTEIN: Line 8:

"Q You did the job with the three men all the time?

"A Yes.

"Q That is, all the time that Mr. Porss was doing the work, the work was done by the three men; is that correct?

"A From 6:00 to 9:30 I asked the men to explain to him how you can help me with this machine, to get on the center once in a while."

MR. STEARNS: Can I have the next question read if it's not going to be read beginning at line 17, sir?

THE COURT: Read 17, counsellor.

MR. GOLDSTEIN: Is your Honor directing me to read it?

THE COURT: Yes, sir, I am.

MR. GOLDSTEIN:

"Q Whatever the time was, from all the time that Mr. Porss was working on the butterworthing operation, you had three men; that is, Mr. Porss, Mr. Schmidt, and a man named Frank?

"A Yes."

On page 44, line 17:

"Q You said that you have four machines working at one time?

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"Antoniou"

"A Right.

"Q That is on one tank?

"A One tank, two each side.

"Q Did the four machines start at the same time?

"A All the machines, they start at the same time on the same level.

"Q They all start at the same time and you shift them at the same time; is that correct?

"A You can't shift the whole four at one time. You got to do one time. It takes maybe ten minutes each, maybe five minutes to pull them up.

"We leave them there and take another one and come back the next one and we get the whole four up."

Page 47, line 11:

THE COURT: Very well.

MR. GOLDSTEIN:

"Q How much does the machine itself weigh?

"A Approximately twenty pounds. I never scaled one off, but the way I lift in my hand, I don't think it's more than twenty pounds.

"Q How much does the hose and the water weigh?

"A With full water?

"Q Full water," --

MR. STEARNS: Your Honor, I object to this as

irrelevant. There is no testimony of the plaintiff about water in the hose, that I can recall.

THE COURT: Do you object to the question on 15?

MR. STEARNS: Yes, sir.

THE COURT: What is the objection?

MR. STEARNS: The objection is, there is no testimony from the plaintiff about any water in the hose, so the weight with water in the hose is irrelevant.

THE COURT: Why? Because there was none?

MR. STEARNS: Because, I assume there was none. He didn't say there was.

MR. GOLDSTEIN: Suppose we allow all of it, which is to tell us whether there was or not. That's what these depositions are about.

THE COURT: I am going to sustain this objection at this time.

MR. GOLDSTEIN: Your Honor will note my exception again.

THE COURT: Yes, I note your exceptions every time. The record does. I don't have to do it.

MR. GOLDSTEIN: I just want the Court above to understand what is happening here.

THE COURT: Oh, they understand. They will understand perfectly.

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MR. GOLDSTEIN: I think they will, Judge. I think they will.

THE COURT: Well, that comment is out of order and the jurors may disregard it.

Will you proceed without any more comments, counsellor?

MR. GOLDSTEIN: On page 48, line 3:

"Q Did you ever try to pick up forty-three feet of hose?

"A Yes.

"Q Were you able to do that?

"A All by yourself?

"Q Yes.

"A No, sir.

"Q Did you ever try to pick up forty-three feet of hose with another man?

"A Two men?

"Q Yes.

"A No, sir.

"Q Can it be done?

"A No. It could be done in emergency, yes. When you don't have nobody else around if it's completely empty, one man pulls the machine up, another man pulls the line, and they split the weight, but we never do that. I can't

do that because it's against the rules.

"Q What about three men? Could three men pick it up?

"A Three men could pick it up very easy.

"Q Three men could pick up the hose full with water --

"A Not full with water. We never do that. We can't do it. You're going to get hurt right there."

"Q If the hose wasn't free from the water," --

MR. STEARNS: Skip down to 16.

THE COURT: Please give me the line as you go along.

MR. GOLDSTEIN: Line 16, sir. I'm sorry.

MR. STEARNS: Your Honor, I'm going to object to the question at line 16.

THE COURT: Why?

MR. STEARNS: Because the testimony here is, first -- there is no testimony from the plaintiff that there was any water in the hose.

Two, his testimony is very certain that the bosun wasn't there at the time.

Now, the question, of course, refers --

THE COURT: You mean there is no foundation.

MR. STEARNS: No foundation for it. With that

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in mind, I will permit the question to be read.

THE COURT: All right.

MR. GOLDSTEIN: With what in mind?

MR. STEARNS: There is no testimony to support the question.

MR. GOLDSTEIN: What are we going to go into now?

THE COURT: Line 16; read it.

MR. GOLDSTEIN: May I read it, sir?

THE COURT: Yes. I said you could. Now you go ahead. When you are given a free signal, why, you go right ahead.

MR. GOLDSTEIN:

"Q If the hose wasn't free from the water, you wouldn't have been doing your job right; isn't that so?

"A No. If it's filled with water, it's impossible to pull it up."

MR. STEARNS: Would you read the next question, please?

MR. GOLDSTEIN:

"Q Why is it impossible?

"A It's too heavy and the machine is still running."

Page 51, line 5:

"Q Mr. Antoniou, my question is, do you agree with me that it is not proper to pick up the hose if there is

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water in the hose?

"A No, that is not right.

"MR. CORWIN: He said It's impossible.

"A It's impossible to pull them up, because the hose is filled up. You don't have no room to get it because it's swollen. The hose got to be empty.

"Q It's your job to make sure"--

MR. STEARNS: Your Honor, this is wholly improper. The question is: Isn't it your job to make sure the hose is empty?

Now, that question is being asked against a context where the plaintiff has testified that the Bo'sun wasn't there. That's clearly irrelevant.

THE COURT: Overruled.

MR. GOLDSTEIN:

"Q It's your job to make sure that the hose is empty?

"A Right. That is right."

Line 25:

"Q Do you use any machine, any piece of equipment, to help the men pick up the hose, pull it up?

"A No.

"Q Anything used to help it?

"A All by hand.

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"Q Not by any hand winch, no portable winch, nothing like that?

"A No. There is no way to do it. It's got to be by hand."

MR. STEARNS: I am going to object to the reading of line 10 on the ground that there is no support, no testimony about any portable winch or that there should have been a portable winch or that the hand operation described is perfectly proper.

THE COURT: I don't think there is any foundation for it, counsellor. Sustained.

MR. GOLDSTEIN: Over to page 58, line 8:

"Q All of this time all four machines are running, is that correct?

"A Yes, four machines."

THE COURT: I don't know what "this time" means, "all of this time."

MR. GOLDSTEIN: I think it can be stipulated that it's the time that the butterworthing operation was taking place.

MR. STEARNS: I agree.

THE COURT: All right.

MR. GOLDSTEIN:

"A Yes, four machines.

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"Q The same three men and you handle all four machines?

"A Right. Sometimes they handle eight machines, three men, like I did on the last ship, eight machines."

MR. STEARNS: Would you finish the answer, just for completeness?

THE COURT: Answer, right.

MR. GOLDSTEIN: I'm sorry.

"MR. CORWIN: I move to strike that as non-responsive.

"A Four stay dead, four running, if you have extra machines."

Line 21:

"Q Mr. Antoniou, when for the first time did you see any lawyer from this office, from the office of Haight, Gardner?

"A From this office, Maritime Overseas?

"Q Yes, the lawyers for Maritime Overseas.

"A Mr. Lucchino."

And on Line 11:

"Q Did Mr. Lucchino identify himself to you as a lawyer?

"A He come down aboard the ship.

"Q He told you he wanted to take a statement?

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"A Take a statement.

"Q He did take a statement," --

MR. STEARNS: Your Honor, before we go into taking statements, are you going to offer the statement?

MR. GOLDSTEIN: Yes, I am.

MR. STEARNS: Well, the admissibility of the statement then is in question.

THE COURT: You are asking for the statements?

MR. STEARNS: No.

THE COURT: What is the problem, counsellor, Mr. Stearns?

MR. STEARNS: There is no problem. He is referring to a statement. I would like to know at this time why the statement is being offered.

MR. GOLDSTEIN: Because this is a witness deposed not on the question of --

THE COURT: Well, you may object to the statement, counsellor. I don't know that it's admissible. Have it marked for identification. You will wait until you finish this deposition, however, counsellor.

MR. GOLDSTEIN: All right, sir.

Line 14:

"Q He told you he wanted to take a statement?

"A Take a statement.

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"Q He did take a statement, didn't he?

"A Yes."

Line 20:

"Q Did you see that statement today or yesterday?

"A Not yesterday, but I seen it a little while ago. I would say four months ago.

"Q When you saw Mr. Lucchino, he got a statement from you; is that correct?

"A Yes. He read it to me. I read it."

Line 4, page 60:

"Q Did you sign it then?

"A Signed it.

"Q Did you ever see that statement again after that?

"A No.

"Q When you came into this office today, did you speak to anybody before the question started?

"A I was coming in this office. I met the gentleman here and we were talking about a lot of things, not with the case.

"Q Not about the case?

"A Very little, simple things, you know. If I know the man. Yes, I saw he was on board the ship, yes."

Page 61, line 10:

"Q Did you see that statement today?

"A Today I don't see exactly the statement or read it myself.

"Q What do you mean, exactly the statement?

"Did you or did you not see the statement?

"A The time I was knocked the men off and the time I was asked the questions.

"Q Who read it to you?

"A Mr. -- (indicating).

"MR. CORWIN: Mr. Pointing to me."

That is the attorney for the defendant.

"Q He read you part of the statement; is that correct?

"A Not the whole thing.

"Q Part of it?

"A Part of it."

Line 5, page 62:

"Q Did you see anybody else yesterday?

"A No," --

THE COURT: Wait a minute. What kind of a meaning does that have? He probably saw plenty of people. I don't know what it means.

MR. GOLDSTEIN: Well, the witness did, sir. He answered the question. It was answered without any objection.

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THE COURT: Well, that doesn't make any difference it's meaningless.

Go ahead and read it.

MR. GOLDSTEIN:

"A No. I saw the fellow come down and he give me the subpoena."

Line 16:

"Q Did he give you any money?

"A Yes.

"Q How much money did he give you?

"A He give me $25 for my expenses, meal, you know, and $20 for --

"Q For what?"

THE COURT: And $20?

MR. GOLDSTEIN: And $20 for --

"Q For what?

"A $25 all together."

MR. STEARNS: Your Honor, may the jury be instructed now that the fee in this court is $20, plus 10 cents a mile.

THE COURT: Yes. It's perfectly proper to give the prescribed fee with the mileage.

MR. GOLDSTEIN: Page 63, line 7:

"Q He brought you to the office today?

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"A Yes. He come down this morning and tell me I have an appointment at 8:00 o'clock.

"Q When did he give you the money?

"A Today."

Will the Court note that the deposition was taken at 2:00 o'clock.

THE COURT: Does it say so anywhere?

MR. GOLDSTEIN: Yes, sir, it says so right on the cover.

THE COURT: That's when it was begun, yes.

MR. GOLDSTEIN: That's correct.

THE COURT: I don't know what that has to do with it but go on.

MR. GOLDSTEIN: On page 65, line 6:

"Q You remember specifically -- and you are under oath now.-- you remember specifically that there was you and there was Porss and there was Schmidt and there was Frank, the deck maintenance man?

"A Right.

"Q You remember that?

"A I do."

Line 18:

"Q Let me finish.

"If the deck maintenance man wasn't there," --

MR. STEARNS: Your Honor --

THE COURT: I don't know what that means. Whose speaking? Corwin?

MR. STEARNS: No, this is Mr. Goldstein.

THE COURT: Mr. Goldstein?

MR. GOLDSTEIN: I was cut off in the middle of a question on Line 15, Judge.

MR. STEARNS: But at line --

THE COURT: Then read the question as it was ultimately delivered.

MR. GOLDSTEIN: All right.

"If the deck maintenance man"--

MR. STEARNS: Your Honor, I object to the form of the question because the first question, the question he hasn't read is: "If the deck maintenance man wasn't there" --

At which point the witness interrupted Mr. Goldstein and said: "He was there all the time."

MR. GOLDSTEIN: He didn't say that. He said "He was there."

THE COURT: All the time it reads in my book --

MR. GOLDSTEIN: On line 17?

THE COURT: No; 13 and 14.

MR. STEARNS: 14.

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Now, Mr. Goldstein not being content with that, now asks the question beginning on line 18 and he then presumes the fact that has been denied. He begins the question with: "If the deck maintenance man wasn't there," now that is improper.

THE COURT: Yes. Sustained. That's speculative, of course. After he said he was there all the time.

MR. GOLDSTEIN: Will your Honor kindly read that question again and then state, after you read it, that that question is speculative?

THE COURT: Yes. It says --

MR. GOLDSTEIN: That goes directly to this witness's credibility.

THE COURT: Oh, no. That's nonsense.

MR. GOLDSTEIN: Will your Honor please read it again --

THE COURT: I can read it.

MR. GOLDSTEIN:--and decide if that does or does not go directly to the witness's credibility. Your Honor will remember we asked for this statement to be put in.

THE COURT: Well, that has nothing to do with this question.

MR. GOLDSTEIN: It certainly does, if your Honor will read the statement.

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THE COURT: I haven't passed on it. It hasn't been objected to. I am not concerned with that statement now.

MR. GOLDSTEIN: Will your Honor understand that the witness knew of the statement. He had read the statement that day. I knew of the statement, and we were, in fact, discussing the statement.

THE COURT: I am sustaining the objection to the question starting on line 19.

Now, proceed.

MR. STEARNS: Your Honor, may I make the additional point. Any question,"If the deck maintenance wasn't there," is wholly improper not only for the reasons heretofore stated but because Mr. Porss says he was there.

THE COURT: All right. I have ruled.

MR. GOLDSTEIN: Can we finish the speech making now and go on with this part.

THE COURT: Yes, on both sides, counsellor. Both sides will refrain from speech making. It's equal.

MR. GOLDSTEIN: Your Honor has now refused to allow me to read the sentence starting on line 19?

THE COURT: Yes, page 65.

MR. GOLDSTEIN: All right. Will your Honor permit me to read it at a later point when we discuss this --

THE COURT: I will pass on that if you come to it.

MR. GOLDSTEIN: When we discuss this statement?

THE COURT: When you come to it, if there is any change. All I am familiar with is what has gone above it.

Proceed.

MR. GOLDSTEIN: Page 66, line 11:

MR. STEARNS: Your Honor, I renew my objection. There is no testimony to support the asking of this question at this time.

THE COURT: The question is: "One man short?" is that right?

MR. STEARNS: That's right. The plaintiff has not said there was one man short.

MR. GOLDSTEIN: The plaintiff has said "One man short."

THE COURT: What is the relevance of this question?

MR. GOLDSTEIN: The relevance of the question is in the statement.

THE COURT: Well, I don't see it.

MR. GOLDSTEIN: Will your Honor read the statement.

THE COURT: No. I'm not going to, now.

MR. GOLDSTEIN: You won't read the statement --

THE COURT: It's not in evidence.

MR. GOLDSTEIN: It is in evidence.

THE COURT: Not before me.

MR. GOLDSTEIN: I offer it in evidence.

THE COURT: Have it marked for identification, then.

MR. GOLDSTEIN: It was marked for identification at the deposition.

THE COURT: Mark it now. It must be marked here in court. You ought to know that by this time.

(Plaintiff's Exhibit 6 marked for identification.)

THE COURT: Now, show it to your adversary and see if he objects.

MR. STEARNS: Your Honor, I object to it as offered as an inconsistent statement which would be the sole basis on the law for it's offering. However, I will offer it myself.

THE COURT: You want to offer it now?

MR. STEARNS: Yes, sir.

THE COURT: Okay. Any objection from you now?

MR. GOLDSTEIN: No, not at all.

THE COURT: Give it to the clerk.

(Plaintiff's Exhibit No. 6 for identification marked and received Defendant's Exhibit E.)

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THE COURT: Now, you want me to read this?

MR. GOLDSTEIN: Yes, sir.

THE COURT: Which part of it do you want me to read, particularly? Will you mark it with parentheses. Just pencil the parentheses about the area.

MR. GOLDSTEIN: And there are other areas that I would want your Honor to read and since it's been offered into evidence, the jury can read all of it, but for the purposes of this discussion.

THE COURT: The jury can read the whole of it but the question now relates solely to this deposition, if we can confine our thought to that for a few minutes.

MR. GOLDSTEIN: Yes, sir. This is the area that I have in mind.

THE COURT: Now, this is offered in connection with question on line 11, page 66, is that right?

MR. GOLDSTEIN: Also Question 19 on page 65.

THE COURT: Line 19?

MR. GOLDSTEIN: Yes.

THE COURT: I don't know what the question means. An objection to form would be in order on that. I think it was made. Question 19: "If the deck maintenance man wasn't there, you would have been doing the job with one man too little; isn't that true?"

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MR. STEARNS: Your Honor, for the two reasons I stated:

One, that the man said that the deck maintenance man was there, and

Two, that Mr. Porss said that the deck maintenance man was there.

Now, a question about, if the deck maintenance is not there, you are one man too short, is improper.

MR. GOLDSTEIN: It's right in the statement, Judge.

THE COURT: We'll have a short recess.

(The jury left the courtroom.)

(In the robing room.)

THE COURT: Which question is it that we are concerned with, Mr. Goldstein?

MR. GOLDSTEIN: At this point, it's on page 65.

THE COURT: Which question?

MR. GOLDSTEIN: Line 19, sir.

THE COURT: That I have another question.

MR. GOLDSTEIN: Yes, sir.

(Pause.)

MR. GOLDSTEIN: And that thing goes --

THE COURT: Wait a minute. Wait a minute.

MR. GOLDSTEIN: Sorry.

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THE COURT: What is the answer that is involved? Line 11?

MR. GOLDSTEIN: Line 10. "One man short." That's the answer.

THE COURT: In other words, if they put this plainly in its context in the whole case, if this is saying, in substance, that if you don't believe the plaintiff, then there was one man short. Isn't that what it amounts to?

MR. STEARNS: Exactly.

MR. GOLDSTEIN: Not necessarily.

THE COURT: What other alternative is there?

MR. GOLDSTEIN: The alternative is that there are four men needed, not three. That's what the plaintiff said.

THE COURT: When did he say that?

MR. GOLDSTEIN: The plaintiff said there should be one man behind to clear the hose.

THE COURT: In his direct testimony?

MR. GOLDSTEIN: In his direct testimony.

MR. STEARNS: Your Honor, if he does say that, if that is in the record, what possible bearing does this have on this alleged accident which, of course, we all know never occurred.

MR. GOLDSTEIN: Thank you, Mr. Stearns. You are beautiful. Sickening, but beautiful.

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THE COURT: I will decide this in a moment.

You may step out.

(In the courtroom. Jury present.)

THE COURT: Members of the jury and counsel, there has been some objection here to certain questions, and apparently the plaintiff here wants to show inconsistencies between what this witness, who was being deposed, Antoniou, said on his deposition, that is, this paper, which was signed by or was taken, and is now in evidence, was a statement taken aboard the OVERSEAS ALEUTIAN on 6-18-71. That's a week or so after the accident, I believe.

MR. STEARNS: After the alleged accident, your Honor.

THE COURT: After the alleged accident, I should have said.

And this deposition, which is being read from, was taken on January 2nd, is it.--

MR. STEARNS: Yes, sir.

THE COURT: -- 1975.

And I may remind you that the question is whether or not there is any inconsistency, but I must also remind you that the plaintiff himself testified that the deck maintenance man was there.

Now, with that, I am going to overrule the

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objection and you may proceed, Mr. Goldstein, and read the question.

MR. GOLDSTEIN: Thank you, sir.

THE COURT: If it's clear as to what it is. What page are you on?

MR. GOLDSTEIN: Page 65, line 19.

THE COURT: What is it that you want?

MR. GOLDSTEIN: The statement, sir.

THE COURT: Will you please proceed with the deposition at this time.

MR. GOLDSTEIN: Yes, and I will read the statement afterward.

THE COURT: No, you will not read the statement now.

MR. GOLDSTEIN: No, I said afterward.

THE COURT: Well, after the deposition.

MR. GOLDSTEIN: Yes.

THE COURT: Very well. Proceed and finish up the deposition.

MR. GOLDSTEIN: Right. May we then go back to page 65, line 19?

"If the deck maintenance man wasn't there, you would have been doing the job with one man too little; isn't that true?"

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And then there was some colloquy.

THE COURT: Well, he first answered.

MR. GOLDSTEIN: The answer is on line 10.

THE COURT: No, line 24 first, isn't it?

MR. GOLDSTEIN: Yes.

"A I don't have to have three men. I can call one man --

"Q I didn't ask you that."

And then on line 10, the question was reread.

THE COURT: And the reporter.

MR. GOLDSTEIN: On line 19. And then the answer on line 10 on page 66:

"A One man short.

"Q One man short?

"A Right."

THE COURT: Go on.

Where are we now?

MR. STEARNS: Your Honor, at this time -- oh, go ahead.

MR. GOLDSTEIN: Line 22:

"Q You said before that all four of you were working; isn't that true?

"A Right.

"Q You and Porss and Schmidt and Frank?

"A Right. Every time I make a move."

Over to page 78.

THE COURT: 78?

MR. GOLDSTEIN: Yes.

At this time, in order for the continuity, can we now read or can I now read this statement to the jury?

THE COURT: Let me see what demands any continuity with that. Page 78, first. What are you going to read there?

MR. GOLDSTEIN: No, not on page 78. I am asking to read the statement.

THE COURT: I know you are but I thought you were going over to 78. That's what you said.

MR. GOLDSTEIN: No, sir. Before I go to page 7[illegible], I should like to read the statement.

THE COURT: I know that's what you said, but I want to see what you are going to read next. I don't see the necessity for reading this at this time.

MR. GOLDSTEIN: For the same continuity that your Honor permitted the defendant's attorney to make.

THE COURT: All right, read it, counsellor, to satisfy you. Read the date, too, there.

MR. GOLDSTEIN: This is statement taken aboard the OVERSEAS ALEUTIAN on 6-18-71. Westville, New Jersey:

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"My name is Angelo Antoniou, and I live at 9 Belnap Road, Hyde Park, Massachusetts. My SS number is 127-14-6990. I was born June 8, 1911.

"On June 8, 1971, I was serving aboard the S/T OVERSEAS ALEUTIAN as the Bo'sun, having been on the vessel continuously since January 4, 1971, but having signed articles on January 12, 1971 at Baltimore, Maryland.

"I had Leroy Porss working from 1800 hours to 2300 hours, which was overtime, on June 8, 1971. His normal tour of duty was 2400 hours to 0400 hours. During this time, we were butterworthing the vessel's tanks. Besides Leroy Porss, I was using able-bodied seaman George Schmidt. I, myself, was pulling up the hose and butterworthing equipment while Schmidt and Porss were standing, one on each side of me, ready to help me with the slack which was created as I pulled up the two-and-a-half inch rubber hose connected to the butterworth machine and its nozzle.

"I asked Porss to help me and he said his back hurt, but not that he injured it in an accident. And this was about 2130 hours."

MR. STEARNS: That would be 9:30, right?

MR. GOLDSTEIN: Yes. That would be 9:30.

"He finished his overtime on June 8, 1971, knocking

off at 2300 hours. The vessel's hose and butterworthing machinery were in good order and clean and dry and we had a firm and steady footing and the deck of the vessel was clean and dry and free of obstruction.

"I never saw Porss injure himself and he never claimed of an injury to me until the following day when he told me he could not stand his normal twelve to four watch, and I notified the Chief Officer, Rolf Steidel, who went over to Porss' room to speak to him.

"I have read this statement of two pages and have had it read to me by Albert A. Lucchino, and believe it to be true and correct to the best of my recollection."

And it's signed by Angelo Antoniou.

THE COURT: All right. Go on now.

What page?

MR. GOLDSTEIN: Now, may we go on to page 78, line 22.

"Q You did three tanks the first day, three tanks the second day; is that correct?

"A Yes.

"Q Leroy Porss was not with you the second day?

"A Not the second day.

"Q He was with you for all three tanks the first day?

"A The first day he was at the beginning there. I call him up and he started working. Then I knock him off quarter to eleven -- 2300.

"Q He started at 1800; isn't that true?

"A 1800.

"Q He worked for five hours?

"A Right.

"Q Is that how long it takes to do three tanks, five hours?

"A It depends. It depends the cargo. It can take all day one tank. It depends the cargo we have."

Page 80, line 5:

"Q Did you do the three tanks in the five-hour period?

"A Let me repeat the question.

"I couldn't remember exactly how many tanks, but I have to do six tanks. It don't make any difference how many tanks I did. It don't make any difference how many tanks I did. It's only four machines and three men there and wait to the right time to finish each tank. It takes two and a half hours each tank with that particular cargo to put fresh, clean water in.

"I couldn't remember exactly if I did three or four or five or ten."

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THE COURT: Is all that about the number of tanks really relevant or material, counsellor. Aren't you reading it unnecessarily?

MR. GOLDSTEIN: It's relevant in terms of the work that Mr. Porss was asked to do the first day.

THE COURT: Well, I think it's rather remote, but go ahead.

I am suggesting that you endeavor to abbreviate, however.

MR. GOLDSTEIN:

"Q Five minutes ago I asked you how many tanks you did that day.

"A I couldn't remember -- it no make any difference. I continue butterworthing. It don't make any difference how many tanks you did it.

"Q It makes a difference if you tell the truth."

MR. STEARNS: Objection to that question.

THE COURT: Yes. Sustained.

MR. GOLDSTEIN:

"I asked you how many tanks you did that day.

"A What is the difference if you did ten tanks?

"Q The difference is to tell me the truth. That is the difference."

MR. STEARNS: I will object to that.

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THE COURT: Sustained. That is immaterial, counsellor. You just go off on a tangent.

Next question.

MR. GOLDSTEIN:

"Q How many tanks did you do that day, the first day?

"A I couldn't remember.It's a long time ago.

"Q What do you remember about that first day that was a long time ago?

"A What I remember?

"Q Yes. What do you remember?

"A I remember I start butterworthing 6:00 o'clock in the morning up to midnight all day, but not --

"Q Eighteen hours?

"A Leroy was no with me. He start working from sixteen to twenty-three. I have different people working with me before that.

"Q From sixteen to twenty-three?

"A From six in the morning, 0600.

"Q How many hours did he work with you that first day?

"A Five hours.

"Q When did he start?

"A From 1800.

"Q He worked from 1800 to 2300?

"A Twenty-three. Exactly was twenty-two forty-five, and I knocked him off."

THE COURT: Where do we go now?

MR. GOLDSTEIN: Page 85, line 20.

"Q Do you remember taking a smoke during this operation from 1800 to 2300?

"A A lot of times.

"Q Where do you go for a smoke?

"A Aft. We all take a turn.Maybe two men at a time.

"Q Do you go for coffee during that five hours, too?

"A Yes. Every two hours.

"Q What do you do with the butterworthing operation while you are getting some coffee? Do you stop it?

"A No.

"Q It goes on?

"A Everything is going. It's not time."

MR. STEARNS: Your Honor, can I have the next two questions, beginning at 7 through 11?

THE COURT: 7?

MR. STEARNS: Line 7.

THE COURT: Line 7.

MR. GOLDSTEIN: That was read, Judge.

MR. STEARNS: All right, 7 and 8 have been read. I now ask to read 9, the question at 9 and the answer to

that and the question beginning at line 12, for completeness.

THE COURT: Line 9.

MR. GOLDSTEIN: Is your Honor directing me to read it?

THE COURT: Yes, I am. Do I have to ask you again, counsellor?

MR. GOLDSTEIN: I would like the record to show it, sir.

MR. GOLDSTEIN:

"Q The times that you are taking a smoke the operation goes on?

"A The operation goes on, but nobody touch anything.

MR. STEARNS: The next question?

MR. GOLDSTEIN: Do you want me to read that, too, sir?

THE COURT: Yes.

MR. GOLDSTEIN:

"Q You told them not to touch anything?

"A Yes, sir."

Do you wish me to read the next question? As a matter of fact, I think I will.

THE COURT: Go ahead.

MR. GOLDSTEIN: If those two were read in.

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"Q You remember telling that to Leroy Porss?

"A They know. Even I don't have to tell them because they don't know what they are going to do the first place anyway even I don't tell him."

Now, over to page 87, line 14:

"Q There were four people there all the time?

"A Right. Four people there working, yes.

"Q There was always one man who wasn't doing anything?

"A All of them, they do something. You can't have the men stand over there. I do something. How can I not let them do anything?"

And on line 25. No, I'm sorry. On line 21. That's the continuation:

"Q If there were three men necessary to pick up the hose, one on the center and two on the sides, where was the fourth man? What did he do?

"A He just stretch the hose back.

"Q He didn't help in lifting, he just pulled the hose out of the way?

"A Yes. That is right.

"Q After you lifted it?

"A Yes. After I lifted it, somebody else lift. He stays on the side and pulls the hose."

MR. STEARNS: Question, please. Line 7.

THE COURT: Yes.

MR. GOLDSTEIN: Is your Honor directing me?

THE COURT: Yes, sir, I am. And when I say line so-and-so --

MR. GOLDSTEIN: I will not read unless your Honor directs me, so that the record can be shown.

THE COURT: I will direct it very carefully each time so that you will not be confused.

MR. GOLDSTEIN: I am not confused at all, Judge.

THE COURT: All right, then you go ahead. I have now directed you to go ahead.

MR. GOLDSTEIN: Line 4:

"Q After you lifted it?

"A Yes. After I lifted it, somebody else lift. He stays on the side and pulls the hose.

"Q It is customary for the four men to do that type of job?

"A Three men. It's supposed to be three men there.

"Q Lifting, or three men lifting and pulling back?

"A Three men lifting and pulling back the same time.

"Q The man who pulls back can't lift, can he?

"A The second one.

"Q That means that only two men lift?

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"A He helps them, naturally. He helps the men on the center and he flips the hose back.

"Q How does he lift and flip the hose back at the same time?

"A He let him go and the hose go one way all by itself. It just slides over. That's all. If the next man is there, he pulls the hose."

Page 89, line 15:

"Q You testified that during the time that the butter worthing was going on, you asked Porss to stop working and to help?

"A 'Come over here, sit down, relax, and I want to talk to you how you can help me with the machine here once in a while. You get in, in the center, like anybody else does.'

"Q Is that the time he told you he had hurt his back?

"A Right. No, he don't say he got hurt his back. He said 'My back hurt me.'

"Q He said his back hurt?

"A Right.

"Q Did you ask him when it hurt?

"A No. I don't ask him questions.

"Q You didn't ask him anything?

"A No.

"Q He just said his back hurt?

"A That's all what he say."

MR. STEARNS: Will you read the next question and the next answer, please?

THE COURT: Line 10?

MR. STEARNS: Line 10.

THE COURT: I so direct.

MR. GOLDSTEIN:

"Q What did you do when he said his back hurt him.

"A I just keep him there. He don't say anything. 'I get the pains and I better go.' He don't mention nothing. I thought the man he has trouble before with his back some and he don't want to do heavy lift. That is what I was thinking.

"Then I find out the next day what was the s[illegible]

And I move to strike that as being unresponsive to the question.

Will your Honor rule on that objection, please.

THE COURT: Mr. Stearns, any objection to the striking?

MR. STEARNS: Yes, sir.

THE COURT: Well, it's only applicable to what is in line 16, isn't it?

MR. STEARNS: I don't know whether that is what

Mr. Goldstein is talking about.

THE COURT: What is that, sir?

MR. STEARNS: Is that what Mr. Goldstein is talking about, the statement on line 16?

THE COURT: Yes, I think so.

MR. GOLDSTEIN: No.

THE COURT: That's what he moved to strike, as I see it, on the record.

MR. GOLDSTEIN: I move to strike everything after "I just kept him there," because the question was --

THE COURT: You don't say so, counsellor.

MR. GOLDSTEIN: Well, I say so now, Judge.

THE COURT: Well, it's a little late.

MR. GOLDSTEIN: Will your Honor rule on it?

THE COURT: Yes, I will rule on it. I am going to say that there is no objection to striking out what is on line 16.

MR. GOLDSTEIN: I didn't ask your Honor about line 16. I asked your Honor to strike out everything after the answer "I just kept him there," which is responsive to the question.

THE COURT: You did not say so.

MR. GOLDSTEIN: I am saying so now.

THE COURT: Well, it's a little late, counsellor.

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I'm not striking out everything; just the last on 16. I have to take the record as I find it.

Go on.

MR. GOLDSTEIN: If your Honor please, may I move at this time to strike the answer with the exception of the one sentence, "I just kept him there," as being totally unresponsive to the question. The question saying, "What did you do when he said his back hurt him?," and the answer being given, "I just kept him there," and everything else being unresponsive. May I now move to strike the rest of that answer?

THE COURT: What do you say, Mr. Stearns? The present motion addressed to an answer --

MR. STEARNS: Well --

THE COURT: -- which was taken in answer to Mr. Goldstein's question, perhaps.

Well, what do you say?

MR. STEARNS: Well, in context with the questions beginning on line 4, it is responsive.

In other words, did you ask him the -- the questions are: "Did you ask him when it hurt? Did you ask him anything? Did he say his back hurts? What did you do when he said his back hurts?"

These things, taken together, make the answer

claim is responsive.

THE COURT: And they do what?

MR. STEARNS: They make the answer responsive.

This man is a Greek-born seaman, and he had some difficulty with the language, as Mr. Goldstein testified.

MR. GOLDSTEIN: He had no difficulty with the language.

THE COURT: Will you please keep quiet unless you want to reply to this?

MR. GOLDSTEIN: That's what I thought I was doing, Judge.

THE COURT: All right. Say whatever you want to say on this argument, counsellor. It has to be ended some day.

MR. GOLDSTEIN: The other questions have nothing to do --

THE COURT: The other questions?

MR. GOLDSTEIN: That is the one that Mr. Stearns just referred to, have nothing to do with what this witness did after he was told by the plaintiff that his back hurt him. The one question on that subject is the question starting on line 10, and I suggest to your Honor that the answer by the first sentence on line 11 is fully responsive

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to that question, and nothing else was responsive. It was just the mutterings of a man who was trying to defend himself.

THE COURT: Well, you don't need to say that, and the jury may disregard it and should disregard that statement.

You want to strike out everything except, "I just kept him there."

Well, I regret that I have to grant that motion.

Proceed.

MR. GOLDSTEIN: Thank you, sir.

I'm sorry your Honor regrets it.

THE COURT: Please go on.

MR. GOLDSTEIN: If your Honor please, may the jury be advised that on page 94 of the deposition is where the statement that has now been read into evidence was admitted for identification.

THE COURT: It's been identified here. It's unnecessary now, counsel, sir. It's admitted. You don't have to formalize it any further.

MR. GOLDSTEIN: All right, sir.

THE COURT: It's admitted. And it's been read, all of it.

Any more? Any more from the deposition?

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MR. GOLDSTEIN: If your Honor will bear with me for a second.

THE COURT: Yes, of course.

MR. GOLDSTEIN: There isn't very much left. In fact, there is nothing left, sir.

THE COURT: Do you want to read anything now, counsellor?

MR. STEARNS: Your Honor, I would ask that the plaintiff read from the other deposition.

THE COURT: We will proceed with the other deposition and then you may read from either one insofar as any portion of the --

MR. GOLDSTEIN: May I ask that your Honor direct the defendant's attorney to read the portions of the deposition, now? That's what the rule calls for.

THE COURT: The Court has the general direction of the procedures in this trial and I'm not going to be told what to do.

MR. GOLDSTEIN: But the Court also has the duty to be fair to both parties, and when one side has read the deposition, the rule calls for the other side to read it immediately after, not to decide.

THE COURT: Does it say "immediately thereafter"?

MR. GOLDSTEIN: That's right, sir.

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THE COURT: Let me see where it says any such thing. Will you take this rule and point out to me where it says "immediately afterwards"?

MR. GOLDSTEIN: May I ask for a recess? I want to give your Honor cases on this point.

THE COURT: No. You don't need any recess. You said you know the rule.

MR. GOLDSTEIN: The rule as determined by dozens of cases on the point, Judge.

THE COURT: Just cite me one.

MR. GOLDSTEIN: That's what I asked for the recess for.

THE COURT: I'm not going to take any recess for that purpose.

MR. GOLDSTEIN: You mean your Honor won't give me the time to look up the case?

THE COURT: I'm not going to stop in the midst of a trial for that purpose. I don't think there is any sense in it.

MR. GOLDSTEIN: But your Honor thinks that there is more sense in allowing the plaintiff to read part of it, allowing the defendant to force the plaintiff to read other parts that the defendant wants and then to hold off reading the later part?

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THE COURT: Would you be willing to read now [illegible], to cover this thing, so we don't have to quibble around any more about rules as to which there are no citations from the attorney?

MR. STEARNS: Yes. I am on page 2, line 23.

"Q Where do you reside?

"A 9 Belnap Road, Hyde Park, Massachusetts.

"Q Mr. Antoniou, are you working now?

"A Yes, sir.

"Q For whom are you working?

"A City Service.

"Q What is your position with City Service?

"A Boatswain.

"Q Are you on a ship as a boatswain?

"A Yes.

"Q What ship is that?

"A S.S. CANTIGNY.

"Q Where is the CANTIGNY?

"A Bayonne. Right now possibly it's nearest to being in dry dock.

"Q Were you served with a subpoena, a piece of paper, telling you to come here today?

"A Yes, sir. It's right in my pocket.

"Q Someone got you off the ship to come here today?

"A Right.

"Q How long have you been sailing, going to sea?

"A I have been sailing since 1930.

"Q About how many of those years have you sailed as boatswain?

"A Eighteen years."

Page 10, line 21:

MR. GOLDSTEIN: That's been read.

MR. STEARNS: 21?

THE COURT: Yes.

MR. STEARNS: Has that been read? I don't have it marked.

THE COURT: Line 10?

MR. STEARNS: Page 10, line 21.

THE COURT: I thought I had it here. I don't have it.

That has been read.

MR. STEARNS: All right.

Page 19, line 15:

"Q Are all machines that are working at the same time kept at the same level?

"A Yes.

"Q Is anybody allowed or the men permitted to move the machines if you are not there?

"A No.

"Q Do the men know what levels to put the machines at or how to move them if you are not there?

"A No."

On page 20, line 21:

"Q You mentioned after you shut off the valve to the hose you wait three or four minutes.

"What are you waiting for them?

"A You wait to drain the hose, drain the water.

"Q Where does the water drain out?

"A Down the tank.

"Q The hose is drained when you're pulling it up, is that right?

"A Right. It should be complete empty. Maybe you leave a pound of water. That means nothing. Maybe left one pound or two pounds of water. That means nothing. I should say a gallon."

Page 22, line 11.

"Q Were any of these machines moved, the butterworth machines, moved while you were not there on the day that Mr. Forss was helping you?"

MR. GOLDSTEIN: Objection.

MR. STEARNS: The basis of the objection is -

THE COURT: Wait a minute.

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What is the basis of your objection, now?

MR. GOLDSTEIN: It's right underneath the question in the book, Judge.

THE COURT: Well, what it is is foundation.

MR. GOLDSTEIN: The question calls for a fact that the witness says he did not know.

THE COURT: Wait a minute. Hold on.

Go down to Question 18, counsellor. I think it's covered there, if he is answering the questions.

MR. STEARNS: He has explained how he knows.

THE COURT: I say, read it: Line 18.

MR. STEARNS:

"Q How would you know if they had been moved, if you came back to your area?

"A I can tell.

"Q How can you tell?

"A I can tell with the machine, the marks right there.

"Q The marks on the hose?

"A How many feet is this machine, how many feet is that one. If they put the machine down, I'm going to ask them who tell you to put the machine down.

"Q Did anybody move the machine?

"A I am the one. I carry the time. I know exactly

the time. I am moving the machines or lowering the machines down.

"Q Did anybody move the machines while you were not there that day?

"A No, sir.

"Q While you were there did you during this time that Mr. Porss was working for you, did you see an accident?

"A No, sir.

"Q Did you see anybody injure themselves?

"A No, sir.

"Q Did any of the three men mention anything about an accident?

"A No, sir.

"Q Mr. Schmidt?

"A No."

Page 24, line 6:

"Q Did you see any of the men let go of the line or let go of the hose while they were lifting the machine out?

"A No, sir.

"Q Do you stand there and assist the men?

"A I have to be there any time they making a move or anything."

Page 8, line 21:

Your Honor, if I may go to line 12, although it has been read.

THE COURT: 12 is in.

MR. STEARNS: Yes, sir, may I read it just to establish the context?

THE COURT: Yes.

MR. STEARNS:

"Q What happened then?

"A I send the man down and tell him, 'Don't forget, wake up the twelve to four watch. Report 8:00 o'clock to the batterworthing.'"

Will Mr. Goldstein stipulate that this is the next day, the next morning?

MR. GOLDSTEIN: Yes; agreed.

MR. STEARNS:

"So the man came back and he say to me -- this man, he tell me his back bothers him. I said, 'Which one?' So he pointed out to his name. So I go back aft, back in his quarters personally. I saw the man who was laying on the bed.

"Q When you say 'the man who,' who was this man?

"A Leroy. So I say good morning to him. I say 'What happened to you?' He said, 'My back hurts me.'

"'Your back hurts you?' He say to me, 'I tell

you that.' 'You don't tell me nothing. How your back hurt you?' He say, 'I get hurt on the butterworthing.' I say, 'When? When you was there. I don't believe that.' I am there all the time. It's part of my job. I have to be there."

Page 31, beginning at line 16:

"Q Mr. Antoniou, did you say that the ship that you are now on is in dry dock in Bayonne?"

This is a question beginning the cross-examination by Mr. Goldstein.

"A The one I am on now?

"Q Yes.

"A Yes, sir. It's supposed to go today, 11:00 o'clock.

"Q CANTIGNY?

"A Yes. She was in Bayonne discharging cargo and then goes in dry docking in Perth Amboy.

"Q Are you remaining on that ship?

"A Yes.

"Q You are not signing off the ship because she is going into dry dock?

"A No. I am going to stay one or two days in dry dock.

"Q Where does the ship go then?

"A I can't tell you that, sir.

"Q You don't know?

"A No. Probably goes south. Never know what they are doing.

"Q In any event, you are staying aboard the ship?

"A Yes.

"Q Wherever it goes, if any place?

"A That is right."

Page 39, line 21:

"Q Do you remember Mr. Porss?

"A Very well.

"Q Tell me what he looks like.

"A He was a little white fellow, good build man.

"Q Was he tall or short or what?

"A He was very tall than I am. Possibly he is about five eight.

"Q About what does he weigh?

"A I can say that time he weighed about 160, maybe. Could be more.

"Q Did he have any marks on his face? Do you remember any scars or any marks on his face?

"A Not that I remember. No, sir.

"Q He wore glasses, didn't he?

"A Him?

"Q Yes.

"A I can't tell you that.

"Q Did he have a beard or a moustache or anything?

"A No. Not that I remember. Dark complexion hair, really white face."

Page 42, line 19, referring to 6:00 o'clock in the afternoon on June 8th.

THE COURT: Wait a minute. What line? 19?

MR. STEARNS: 19. These questions refer to 6:00 o'clock in the afternoon on June 8th:

"Q Did all three men come to the job?

"A Two men, two A.B.'s from twelve to four, and I have a deck maintainer with the two A.B.'s.

"Q What was his name, the deck maintenance man?

"A Frank is the first name.

"Q Did you ever know his second name?

"A I forgot his last name.

"Q Those were the three men on the job?

"A Right.

"Q Did you ever call a fourth man?

"A I don't have to.

"Q Did you? Yes or no.

"A No.

"Q You did the job with the three men all the time?

"A Yes.

"Q Mr. Antoniou, what does Mr. Schmidt look like?

"A He looks around fifty-seven, red face, you know, gray hair. He is an old man.

"Q What about Frank, the deck maintenance man?

"A Same complexion, red, gray hair, around forty seven.

"Q What is his weight and how tall is he?

"A About probably 140, maybe not."

Line 15:

"Q Doesn't the contract"--

Page 66, line 15:

"Q Doesn't the contract call for three men besides you?

"A Not beside me; including me, on the union ships. That was a union ship. Three men butterworthing. That is in the contract, because I get paid for the job extra. So I break -- always I break an extra man, if I couldn't break more, to be more help."

Page 89. No. That's been read.

THE COURT: Line 15 has been read. Line 22?

MR. STEARNS: I was going to read that but it's been read. I am now moving on.

THE COURT: Next page?

MR. STEARNS: Page 104, line 3:

"Q When you close the valve on the fire line that leads to the hose that goes to the butterworth machine, when you close that valve, what happens?

"A I wait a few minutes, drain the hose out.

"Q What happens to the water in the hose?

"A It goes down in the tank.

"Q Are the nozzles open?

"A All the time.

"Q The water drains out of that hose?

"A Yes, drains out.

"Q The machine is inside the tank then; is that correct?

"A The machine is still down in the tank, yes."

MR. STEARNS: That's all I have.

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THE COURT: All right. Now, Mr. Goldstein, start with the other deposition.

MR. GOLDSTEIN: At this time, if your Honor please, I should like to read into the record various parts of the answers to interrogatories.

THE COURT: I thought you were going to take the depositions. Do you want to change the schedule now? I thought you said you were taking both depositions this morning. I heard nothing about interrogatories.

MR. GOLDSTEIN: If your Honor please, I thought I had mentioned in your room today that I was going to read some of the interrogatories.

THE COURT: Maybe you did, but I didn't understand you to mean that you would interrupt the depositions.

Now, do you want to interrupt the depositions?

MR. GOLDSTEIN: Judge, I don't think I am interrupting the depositions. It's over, and now I want to read the interrogatories, and I will read the deposition later.

THE COURT: All right. Get me the interrogatories, please, and the answers.

Do you want to read all of them? If not, will you indicate which ones you are going to read to Mr. Stearns, so that he can have any objections made.

MR. GOLDSTEIN: These are the defendant's answers

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to plaintiff's interrogatories.

THE COURT: Did you indicate all of them or only some of them, counsel?

MR. GOLDSTEIN: If your Honor please, I am going through t[illegible] right now.

THE COURT: All right. Do that and give the numbers to your adversary.

MR. GOLDSTEIN: Yes; I will, sir. I am almost done now.

THE COURT: See if you can omit some of them, with the idea of shortening this case, counsel.

MR. GOLDSTEIN: Yes; I will, sir.

THE COURT: I would be thankful for small favors.

(Pause.)

THE COURT: Have you got it now, counsel?

MR. GOLDSTEIN: Yes.

THE COURT: Tell Mr. Stearns what you have there.

MR. GOLDSTEIN: All right.

Will your Honor kindly advise the jury the purpose of interrogatories and that they are under oath by the defendant?

THE COURT: Generally, yes.

These are questions in writing addressed here by the plaintiff to the defendant, and they have been answered by

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way of being sworn to by someone on behalf of the defendant, the defendant's lawyers, in fact, not the defendant directly.

Is that satisfactory to you?

MR. GOLDSTEIN: Sir, in this case it was a Mr. Rosenbloom, who was the secretary of the defendant corporation, who verified.

THE COURT: It is by Samuel Rosenbloom. Is he said to be the secretary?

MR. STEARNS: He is the corporate secretary, your Honor.

THE COURT: All right. He was the secretary of the defendant corporation.

MR. GOLDSTEIN: Will your Honor also advise the jury that the defendant is bound by its answers given to interrogatories, just as the plaintiff is bound by his answers?

THE COURT: Yes.

MR. GOLDSTEIN: That is true, isn't it, sir?

THE COURT: Yes.

MR. GOLDSTEIN: Fine. Thank you.

THE COURT: Now, which one are you starting with?

MR. GOLDSTEIN: Number 1, sir.

THE COURT: All right. I don't know why it is necessary. Objections may be made by Mr. Stearns to materiality

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and relevancy at any time.

MR. STEARNS: Your Honor, I consider 1 relevant, because there has been testimony of June 12th instead of June 11th.

THE COURT: Read it, counsel.

MR. GOLDSTEIN: Interrogatory number 1:

"State the itinerary of the vessel S. S. OVERSEAS ALEUTIAN for the voyage during which time the plaintiff sustained the injuries complained of herein, setting forth the dates when the vessel was in each and every port."

Answer: "1. Eagle Point, New Jersey (departing June 7, 1971) to Marrero, Louisiana (arriving June 11, 1971)."

"2. State the date when and the port in which the plaintiff signed aboard the vessel."

"2. Eagle Point, New Jersey, on June 6, 1971."

"6. State the rating of the plaintiff aboard the vessel and his monthly rate of earnings, both base and overtime."

"6. A. B., base pay $506.41 per month, overtime $3.44 and $4.01 per hour."

"7. Set forth the total base and overtime wages earned by the plaintiff during the voyage involved herein and, in addition thereto, annex a copy of the earning sheets and wage vouchers."

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"7. Base pay $101.28, overtime $47.57."

"8. State the plaintiff's duties aboard the vessel."

"8. Deck maintenance man."

"9. State whether the plaintiff's duties included aiding in the use of a Butterworth System of cleaning tanks in the cargo areas of the vessel on specific orders of his superior officer."

"9. Yes."

"10. State whether a photograph or photographs of the cargo tankes, and more specifically, the tank on which the plaintiff was performing duties at the time of his injury is available and will be forwarded to plaintiff's attorney at his cost or whether the defendant will permit plaintiff's attorney or his representative to take photographs of said area."

"10. We have photographs of the deck area in the vicinity where Porss was working. You may see them or take your own photographs."

If I may say to the jury, Mr. Stearns, these are the photographs that have been offered.

THE COURT: They have been admitted, you say?

MR. GOLDSTEIN: Yes.

THE COURT: Very well.

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MR. STEARNS: I am going to object to Interrogatory Number 11, your Honor.

THE COURT: Sustained.

MR. GOLDSTEIN: YOur Honor will note my exception.

THE COURT: Yes.

MR. GOLDSTEIN: Next interrogatory is 13.

"13. S whether the defendant had a system or routine of Butter- ching cargo tanks on the vessel for the voyage in progress at the time of the plaintiff's accident complained of herein and, if so, set forth in detail the system or routine of Butterworthing of the cargo tanks, how often said Butterworthing equipment was used, the step-by-step procedure carried out to Butterworth cargo tank, the name and rating of the man or men who performed the duty at the time that the plaintiff was performing said duty and was injured, the name and rating of the officer who ordered said work, the name and rating of the men and officers who inspected the cargo tank area after the work was performed in order to ascertain that it was completed and, in addition thereto, whether any equipment, appurtenance or gear was provided to the men performing the Butterworthing with the plaintiff to lower and raise the Butterworthing with the plaintiff to lower and raise the Butterworthing equipment into and out of the cargo tank" --

MR. STEARNS: Objection to parts of this as being

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irrelevant.

THE COURT: Which parts?

MR. STEARNS: Well, the part about inspecting the tanks and the part about any gear or equipment, and the part about -- Well, those two parts.

THE COURT: I don't know.

MR. STEARNS: I will withdraw the objection, your Honor.

THE COURT: All right. The objection is withdrawn. Read it now, counsel.

MR. GOLDSTEIN: -- "and, if so, set forth in detail the type of equipment that was provided by name, description, model number, manufacturer, and any other means necessary to specifically identify the equipment so provided."

THE COURT: I question if all that is material, counsel. Do you insist on it?

Go ahead. Go ahead.

MR. GOLDSTEIN: "13. The Butterworthing was done by lowering the equipment into the tank by manual labor and was withdrawn in the same fashion; Angelo Antoniou, George Schmidt and Francis Wherrity (see crew list); Antoniou ordered the work; the Boatswain inspected the tanks; a cradle was provided of which photographs are available."

"14. State the weight of the entire" --

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MR. STEARNS: I object to this, your Honor. I object to this.

THE COURT: What is the objection?

MR. STEARNS: Well, this is the weight of the water in the hose again. There is no testimony that there was any water in the hose. The testimony is entirely to the contrary. This is a canard.

THE COURT: Yes. Sustained.

MR. GOLDSTEIN: If your Honor please, the testimony of Mr. Antoniou was that it is right to have the water drained out but that sometimes there is water still in the hose.

THE COURT: Sometimes is not sufficient.

MR. GOLDSTEIN: Okay. Your Honor will note my exception.

"15. State and identify in detail the Butterworthing System used by the plaintiff and his fellow workers at the time of his injury, including all hoses and lines incidental thereto, by manufacturer, name, model number, and all other means and methods necessary to fully identify said equipment and appurtenances and, in addition thereto, annex photographs and literature or brochures of the said equipment and appurtenances in use at the vessel."

"15. Photographs of the equipment are available for your inspection."

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"16. If more than one Butterworthing System was aboard the vessel on or about June 7th or 8th 1971, state whether all were substantially the same in operation, model number, weight, purpose and for general or specific use as a tank cleaner.

"16. There was only one system."

State the name, address and rating of the officer or plaintiff's superior who ordered the plaintiff to join in the Butterworthing System operation to clean cargo tanks on or about June 7th or June 8, 1971."

"17. Boatswain Angelo Antoniou, 9 Belknap Road, Hyde Park, Massachusetts 02136."

"18. State the substance of the orders given to the plaintiff by his superior when ordered to aid in the use of the Butterworthing System on June 7 or 8, 1971."

"18. To assist in Butterworthing the ship's tanks."

"19. State where aboard the vessel said orders were given to the plaintiff."

"19. Unknown."

"20. State the time of the day and the date when the said orders were so given."

"20. Unknown, but before 0800."

MR. STEARN: -- which is eight o'clock in the morning; correct?

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MR. GOLDSTEIN: "21. State the time when the work of the tank cleaning operation was started and was completed on June 7 or 8, 1971."

"21. 0800 - 2300."

"22. State when the plaintiff's superior was present for the entire period of the Butterworthing operation at the locale of the use of the Butterworthing System by the plaintiff and his co-workers in June 1971."

"22. The Boatswain was present throughout the operation."

"25. State whether the defendant by or through its employees made a report or log entry concerning the plaintiff's accident and, if so, set forth the name and address of the person having said report or log entry in his possession at the present time and, in addition thereto, annex a photocopy of said report or log entry."

"25. Yes. Copy annexed."

MR. STEARNS: Would you read 26?

MR. GOLDSTEIN: And that annexed copy --

MR. STEARMS: -- is this, is it not?

MR. GOLDSTEIN: Yes. The original of the copy that is annexed to the interrogatories was offered into evidence.

"26. Set forth the names, addresses, ratings and Z

numbers of all eyewitnesses to the plaintiff's accident complained of herein.

"26. There were no known witnesses to the incident described by plaintiff in his deposition."

"27. State the names, addresses, ratings and Z numbers of all officers, crew members and eyewitnesses who have given oral or written statements or affidavits concerning the accident complained of herein, and the names of the persons to whom such statements or affidavits were made, the dates thereof, and the names and addresses of the persons who now have custody of said statements or affidavits and, in addition thereto, annex a photocopy of said statements or affidavits."

"27. Boatswain Angelos Artoniou and Seaman Francis Wherrity, copies annexed."

If the Court please, at this time may I inform the jury that the statement annexed by Angelos Antoniou is the statement that has been introduced into evidence.

THE COURT: As Exhibit --

MR. GOLDSTEIN: As Exhibit E, Defendant's Exhibit E. And that the statement of Francis Wherrity --

THE COURT: Where is that one now?

MR. GOLDSTEIN: That is in the answers to interrogatories, and I should like to read that into evidence.

MR. STEARNS: Oh, come on.

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THE COURT: Have it marked for identification first.

MR. STEARNS: Your Honor, I object to the reading of a statement by a witness no matter how annexed to whatever paper heretofore filed. That was a discovery proceeding. It gives the plaintiff an opportunity to see what the man stated and to call him as a witness.

This is a totally improper offer of a statement annexed to an interrogatory.

MR. GOLDSTEIN: It is a statement taken by the defendant.

THE COURT: Well, I will reserve decision until after lunch, counsel.

(Plaintiff's Exhibit 7 marked for identification.)

THE COURT: It is one o'clock now.

MR. GOLDSTEIN: Does your Honor wish me to stop at this point?

THE COURT: How many more have you got?

MR. GOLDSTEIN: I think we are all pretty tired, Judge, at this stage. I would appreciate it if we could stop at this moment and go on after lunch.

THE COURT: All right. We will stop and come back at 2:10 this afternoon.

Please continue to heed my previous instruction.

Let me have that last exhibit that you proposed. Is

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this the answer?

MR. GOLDSTEIN: This is the statement that they say is annexed.

THE COURT: Yes. It is marked Exhibit 7 for identification.

(A luncheon recess was taken.)

- - -

AFTERNOON SESSION

2:10 p.m.

(In the robing room; both counsel present.)

THE COURT: Now, I take it, counsel, you wanted to read this number 27 and the answer.

MR. GOLDSTEIN: Yes, sir.

THE COURT: The answer merely contains the opinion. Now, what are the objections you would have to that, counsel? What objections do you have? I think there may be suitable objections. I will say that.

MR. STEARNS: Yes. I think this: if this answer had been in recitation form and later, for example, the statements ultimately passed to Mr. Goldstein in the mail, then I think clearly there would be no question that the hearsay statement of this individual would not be admitted in evidence.

As I see it, Mr. Hopkins, the late Mr. Hopkins, who prepared these answers, simply states at his convenience -- Mr.

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Goldstein's and I am sure his own -- merely annexed the statement to the papers, the form of the interrogatories, as I say, for his convenience.

Now, that doesn't make an inadmissible statement admissible, and it would be improper for Mr. Goldstein to read this hearsay statement of this witness, who resides in Philadelphia and was available to Mr. Goldstein throughout the pendency of this litigation for deposition, I am sure.

THE COURT: This is a somewhat unusual situation here. You both are familiar with the question. The only thing that occurs in the answer is the attached statement, and it does contain several matters of opinion, and I am going to sustain the objection to it on that ground. It is hearsay, in the first place. We can't cross-examine the affiant, or the person that made the statement.

MR. STEARNS: Your Honor, if that is the Court's ruling, I would ask that the jury be instructed that the offer of the statement was improper, that they are to take nothing from the --

THE COURT: Has it been read?

MR. STEARNS: No.

THE COURT: Then it isn't to be read.

MR. STEARNS: I understand it is not to be read, but I am asking you to ask the jury to disregard the offer of

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the statement and to tell the jury that the offer was improper as it is.

THE COURT: Has it been offered in evidence?

MR. STEARNS: He has offered to read it. He said, "I will read the statement."

THE COURT: Was it admitted?

MR. STEARNS: No.

THE CLERK: Exhibit 7 was just marked for identification.

THE COURT: Then I am going to refuse to admit it. You may, among other things, see a case, DeBruce vs. the Pennsylvania Railroad Company, 6 FRD 403. But I base it upon the fact that it is hearsay, and it is in effect an attempt to smuggle in an opinion of an incompetent person who is not qualified to pass upon these matters as far as expertise is concerned.

That's it, gentlemen.

MR. GOLDSTEIN: Your Honor will note my exception.

THE COURT: It is noted on the record, counsel. I don't have to say I will do it. You just burden the record unnecessarily.

(In open court; jury in box:)

THE COURT: Members of the jury, you may disregard the question which was read, number 27. I have sustained

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substantial objections to it.

Are there other interrogatories?

MR. GOLDSTEIN: Yes. Interrogatory Number 29.

"29. State whether any treatment was given to the plaintiff by the defendant as a result of the accident and, if so, set forth the names, addresses, ratings and Z numbers of the person or persons who treated the plaintiff, the date of said treatment, the place of said treatment, the nature of said treatment and, in addition thereto, annex a photocopy of the medical logs and reports of said treatment."

The answer is --

THE COURT: I take it there is no objection to this question.

MR. STEARNS: Only in the fact that the reference is to "accident" and that it was answered as if to the alleged accident.

THE COURT: All right.

MR. GOLDSTEIN: The answer is: "29. Yes. Aspirin and soap liniment."

THE COURT: Read it fully.

MR. STEARNS: That's it.

THE COURT: That's the anwer?

MR. GOLDSTEIN: That is the answer.

THE COURT: There is no reference to accident in it,

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is there?

MR. GOLDSTEIN: In the answer?

MR. STEARNS: No, sir. It is just --

THE COURT: Well, you don't object to his reading the answer?

MR. STEARNS: No; I do not.

THE COURT: Read the answer.

MR. GOLDSTEIN: "29. Yes. Aspirin and soap liniment."

Now, down to 33.

MR. STEARNS: I am going to object to this, your Honor.

THE COURT: Wait a minute. Let me look at it.

MR. STEARNS: Yes, your Honor. It is not presently known.

THE COURT: It may be known later, then.

All right. Read it.

MR. GOLDSTEIN: "33. State whether the defendant claims the existence to the plaintiff of any prior medical condition which caused or contributed to the plaintiff's accident and/or injuries and, if so, state the nature of the prior existing condition and the manner in which it is claimed it caused or contributed to the plaintiff's accident and/or injuries, and the names and addresses of the physicians and hospitals who treated the plaintiff for the said conditions

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and the dates of said treatment."

The answer is: "33. Not presently known."

THE COURT: That's it. Any others, now?

MR. GOLDSTEIN: Yes. 34.

THE COURT: Any objection to 34, counsel?

MR. STEARNS: No objection.

THE COURT: Read it.

MR. GOLDSTEIN: "34. State whether the plaintiff received a Master's Certificate in order to obtain medical treatment when he left the vessel and, if so, the date thereof and, in addition thereto, annex a copy of said Master's Certificate."

"34. Yes. June 11, 1971. A copy is not available."

THE COURT: Anything else?

MR. GOLDSTEIN: Yes. 35.

"State whether the plaintiff received any money for his maintenance and cure and, if so, in what amount, for what periods and the name and address of the person from whom the said amount or amounts were received and, in addition thereto, state the reason for stopping the payment of maintenance and cure at the date set forth by the defendant and whether the defendant has any information of subsequent dates of the plaintiff being unfit fur duty and the date that the defendant received such information."

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"35. He received a total of $380.00 for the period from June 19, 1971 to August 6, 1971. Maintenance was ended when plaintiff was declared fit for duty."

MR. STEARNS: Your Honor, at this time would you explain to the jury that maintenance and cure is something that is not bound up in any way with whether or not this man had an accident?

THE COURT: This is independent of the claim set forth in the complaint which we have been trying.

If there is anything which the jury has to do about it, it will be at some subsequent hearing.

All right. Now you are going back to some depositions?

MR. GOLDSTEIN: Yes.

THE COURT: Which deposition is this one?

MR. GOLDSTEIN: This deposition is the deposition of George Schmidt.

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THE COURT: Well, proceed.

This is a deposition taken by the defendant of Mr. Schmidt on January 21, 1975 at 12:30.

MR. GOLDSTEIN:

"GEORGE SCHMIDT, having been first duly sworn by Nathan Borak, C.S.R., a Notary Public of the State of New York, testified as follows:

"EXAMINATION BY

MR. STEARNS:"

And the attorneys who participated were both Mr. Stearns and myself.

"EXAMINATION BY

MR. STEARNS:

"Q What is your name?

"A George Schmidt.

"Q Where do you live?

"A 35 Pawtuxet Terrace, West Warwick, Rhode Island.

"Q Mr. Schmidt, are you presently employed?

"A Yes, I am.

"Q For whom do you work?

"A Hudson Waterways, right now, and the USNS YUKON.

"Q In what capacity?

"A I am an AB."

Over to page 4, line 18:

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"Q Were you a seaman employed aboard the OVERSEAS ALEUTIAN in June of 1971?

"A Yes, I was.

"Q What were you?

"A I was an AB."

Page 5, line 7:

"Q Was a man by the name of Leroy Porss a member of the crew of the OVERSEAS ALEUTIAN in June, 1971?

"A Yes, he was.

"Q What was his rating?

"A I believe he was an AB."

Down to line 19:

"Q Were you returning from either Boston or New York to Pilottown?

"A Empty, yes."

Line 25:

"Q Would it have been in the months of June or before that?

"A It would have been before June. I believe it was somewhere in the month of January."

MR. STEARNS: Your Honor, that makes no sense unless he reads the question on page 5, beginning at line 22, when the question is asked of this witness, "When did he join this vessel?"

MR. GOLDSTEIN: You are absolutely right.

"Q When did you join the vessel?

"A I don't know the exact date right offhand, but I have it on my discharges.

"Q Would it have been in the months of June or before that?

"A It would have been before June. I believe it was somewhere in the month of January."

And then line 9 on that page:

"Q What rating did you sail aboard the OVERSEAS ALEUTIAN?

"A AB.

"Q Would you describe what butterworthing means," --

THE COURT: Do we have to listen to all this again about butterworthing? Hasn't it been described quite voluminously in the depositions and elsewhere?

MR. GOLDSTEIN: It is described somewhat differently by this man.

THE COURT: Well, maybe he's a wonder; I don't know. Go ahead if you insist, but it seems that you might shorten this trial a little bit by leaving out duplicative matters. They're cumulative.

Go ahead.

MR GOLDSTEIN:

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"Q Are these the cargo tanks" --

"Q Would you describe what butterworthing means, the phrase butterworthing?

"A It is actually cleaning of the tanks or washing the tanks through a system where they have hose and a sprinkler system on the end of each hose that is lowered to various depths into the tanks, and when they are turned on it sprinkles the entire tank system.

"Q Are these the cargo tanks of the ship?

"A Yes, cargo tanks.

"Q Is butterworthing done when the tanks are empty?

"A Yes, it is.

"Q As I understand it, on the run of the OVERSEAS ALEUTIAN that we have been talking about, the ship was going from either Boston or the Port of New York empty, is that correct?

"A Yes.

"Q Does that mean that the butterworthing would be done on the way down to Pilottown, Louisiana?

"A That is right.

"Q In early June, 1971, was butterworthing done on the voyage of the ship down to Pilottown?

"A Yes.

"Q What members of the crew would be engaged and

were engaged in this butterworthing at this time in early June, 1971?

"A Strictly the deck department, which would be other AB's and the boatswain, and the deck maintenance, depending on how many tanks are to be butterworthed and how many machines were being used, and in many cases you had at least, I would say, three men to a machine. If they are in a hurry they would run six, using two machines.

"Q Who was the boatswain on the OVERSEAS ALEUTIAN during the first week, or the early part of June, 1971?

"A We always called him Tony. He was a Greek fellow.

"Q Do you know his last name?

"A I can't remember right offhand.

"Q Does the name Antoniou refresh your recollection.

"A Antoniou, or something of that kind.

"Q Who were the other AB's on the ship as best you remember?

"A When it comes to remembering that far back, it is pretty difficult. Most of them we call them by nicknames anyway. That is why it is difficult.

"Q During butterworthing you have testified that the butterworth hose and the butterworth machine are lowered into the tanks?

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"A Yes.

"Q Would the machine and the hose be lowered in tanks at stages?

"A Yes.

"Q Would the machine be allowed to operate at stages in the tanks?

"A Yes.

"Q During this time in June, 1971, was the butterworthing operation one that entailed dropping the machine and the hose a certain distance in the tank and allowing the machine to run for a certain period of time?

"A At that time, after a certain period of time had elapsed, you would lower the hose a further distance down the tank?

"A Yes.

"Q This would continue?

"A This was continued for probably four drops, depending on how dirty the tanks are, sometimes more.

"Q How long would the machine be in operation on each tank?"

THE COURT: All of this is repetitious, counsellor. You know it.

MR. GOLDSTEIN: Well, if your Honor will give me a minute, let's see if we can cut it down.

THE COURT: All right, I will be willing to let you try to cut it down. It will be good, profitable work.

(Pause.)

MR. GOLDSTEIN: Your Honor, can we go on with a certain amount and then I will go back to it?

THE COURT: You mean you want to come back to something?

MR. GOLDSTEIN: No. I have gone up to page 40 or so in checking and I would like to read up to page 40 and stop there for a moment and then continue on checking because there doesn't seem to be too much after that.

THE COURT: All right. Go ahead.

Where are we now?

MR. GOLDSTEIN: Page 10, I believe, line 5:

"Q How many men were engaged in removing the butterworthing hose during this period of time on this ship?

"A I would say three.

"Q Did these three men each have a separate role or function or job?

"A Yes.

"Q In the handling of the hose and the machine?

"A Yes, it is routine that one man would take care of the line, another man takes care of the hose, and the man in the center does the picking up of the line and the

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hose; but the line and the hose men are the men that actually hold the strain on both of the items, so that the hose and the line wouldn't go into the tank.

"In other words, the man in the center would bring up all the slack.

"Q You have used the expression 'line.' What is that?

"A Rope.

"Q Is it a piece of manila line?

"A Yes, sometimes nylon, but manila in this case.

"Q Is it fastened to the butterworth hose?

"A To the butterworth machine, or as close to it as possible so it wouldn't interfere with the sprinkler.

"Q Your testimony is that one of the three men engaged in this job would take up slack in this manila line?

"A Yes.

"Q And it is your testimony that one of the two other men would take up the slack on the hose? Is that correct?

"A That is correct.

"Q And the third man will be the individual who did the actual lifting of both hose and line, is that right?

"A Right.

"Q In this operation you have described where would the man holding the line, the manila line, be in relation to the man who is doing the actual lifting.

"A One man with the line would be on the left, on the right side of me, and the man on the hose would be roughly about the same. In other words, one man is on the left and one man is on the right.

"Q Of the man in the middle?

"A The man in the middle is the man who pulls the hose up.

"Q This hose fits through an opening, does it not?

"A Yes.

"Q Is that called the butterworth opening?

"A Yes."

Line 14:

"Q What was the dimension of the hose?

"A I think we had, of course some of your hoses are thicker than others, but the hose we were using was about a four inch hose, similar to a normal fire hose.

"Q I asked you about the dimension of the butterworth opening and you said 16 inches.

"A I am talking about the diameter.

"Q Is the four inch also diameter?

"A Yes.

"Q Can you describe in your own words how the man in the middle or the center man would lift both the hose and the line?

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"A Well, a strain is usually kept by the man with the line -- I am talking about the rope again -- and there is a strain kept, just a normal strain, a man that is holding the hose, and the man in the center, such as myself, would take this line and this hose and pick it up and spread it out so it would hit the edge of the so-called Butterworth hole, and this would help prevent the hose or the line from sliding in, and it is continuous. And each time you do this the man with the line just holds it so it can't go any further.

"Q Would this lift that you have described, the man in the center would make, would that require him to bend over, over the hole and reach down with one hand and --

"A Yes, with both hands.

"Q Grasp the line with one hand and one hand to grasp the hose?

"A Yes.

"Q Would he raise up and spread his hands out (Indicating)?

"A Yes.

"Q To take as much of the hose out of the tank as possible with one stroke, is that right?

"A Yes.

"Q When he had done that what would the man" --

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THE COURT: Wait a minute, now. Where are we?

MR. STEARNS: 14, line 4.

THE COURT: Some of these questions are really split. Line 14, page 14.

MR. GOLDSTEIN: Line 4, Judge, page 14.

THE COURT: All right. Go on.

MR. GOLDSTEIN:

"Q When he had done that what would the man handling a line do?

"A He would keep holding the little old line to make sure it doesn't fall in.

"Q Would he also take up the slack that you created?

"A Yes.

"Q Would the man handling the hose also do that?

"A He also takes up the slack."

Page 20.

If your Honor please, there is a statement that Mr. Schmidt said he made. Mr. Stearns, at the time of the deposition, was given -- said he would give me a copy of it. I have not received it yet.

THE COURT: Where is that referred to in the deposition?

MR. GOLDSTEIN: Page 20.

THE COURT: Read the questions first on page 20.

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MR. STEARNS: You were shown the copy of the statement at that time, right?

THE COURT: Read your questions.

MR. GOLDSTEIN: Judge, I just asked if that was his statement, that was his signature; and he said yes, it was. And that was it. And then I asked that the statement be given to me.

THE COURT: Was it marked for identification somehow?

MR. STEARNS: It was marked for identification and handed to Mr. Goldstein, and he asked about the signature and then asked no further questions about the statement.

MR. GOLDSTEIN: That's correct. And Mr. Stearns said he would give me a copy.

MR. STEARNS: I said I would make a photocopy.

THE COURT: It says, "Document handed to counsel." That's Mr. Stearns handing it to Mr. Goldstein, I assume.

MR. STEARNS: Yes, sir.

THE COURT: Go on.

MR. GOLDSTEIN: Mr. Stearns, may I have the copy, please?

MR. STEARNS: Well, now you have got me, Mr.

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Goldstein. I didn't anticipate this and I don't think it is in my bag, but I'll look.

(Pause.)

MR. STEARNS: Your Honor, I am sure I don't have it.

MR. GOLDSTEIN: Well, may we go on and Mr. Stearns, you can supply it to me later?

THE COURT: As far as you can. You can't tell much about a statement if it's not here.

MR. GOLDSTEIN: On page 22, line 5.

THE COURT: Well, go ahead.

MR. GOLDSTEIN:

"Q You drop one hose down at a time, and while that is sprinkling you drop down another hose, and then another? And then you lower the first hose down to another level?

"A Yes.

"Q So it's a continuous operation, moving from hose to hose, is that basically what we are talking about?

"A Yes."

MR. STEARNS: Your Honor, may we note that this is now so-called cross-examination.

THE COURT: This is cross-examination by whom?

MR. STEARNS: Mr. Goldstein.

THE COURT: Mr. Goldstein?

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MR. GOLDSTEIN: Yes.

THE COURT: All right.

MR. GOLDSTEIN: On line 20:

"Q How many tanks was your gang handling?

"A I would say three.

"Q You would have three different hoses?

"A Yes.

"Q And three different lines, and three different butterworthing machines?

"A Yes."

Page 24:

"Q Do you know if the butterworthing system continued to be used on this ship for more than an eight hour period on the day that Mr. Porss was allegedly hurt?

"A Yes, definitely."

Line 10:

"Q Can you tell me the hours that you worked?

"A The hours that I used to work?

"Q The hours that you worked on the day of the alleged injury to Mr. Porss.

"A From eight to twelve in the morning and twelve to four in the afternoon, and four to five in the afternoon. I am separating this because of watches.

"Q These are the times that you were working on the

"Schmidt"

Butterworthing system on the day or days that you were working with Mr. Porss?

"A Yes.

"Q Is that correct?

"A Yes.

"Q And you are certain of these hours?"

THE COURT: Three yeses are all answered in one. Go ahead.

MR. STEARNS: Your Honor, -- I withdraw my objection.

MR. GOLDSTEIN: May I reread the last question?

"Q And you are certain of these hours?

"A Yes.

"Q Did you room with Mr. Porss?

"A I don't recall rooming with him. I believe -- I don't remember whether I had a room of my own for a while because there was an awful change of room aboard there.

"Q Do you remember Mr. Porss at all?

"A Yes, I do.

"Q How long did he remain on the ship?

"A I think he made only the one roundtrip, which would be approximate -- you see, there was such a change-over, we used to get new people in Boston, new people down in the Gulf, and it was one of these vicious circles.

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"Q I want to find out how well you remember Mr. Porss.

"A I don't think he was there more than thirty days or in that area.

"Q You do remember him being on there around thirty days?

"A Yes."

And over to page 27, line 11:

"Q Did he have long hair or short hair, and what color was it, if you recall?"

MR. STEARNS: Your Honor, may I ask what the tenor or purpose of reading this is. I don't see the relevance of this description.

THE COURT: I don't know what difference it makes whether he had long or short hair.

MR. GOLDSTEIN: The relevancy is how well did he know Mr. Porss or whether he could identify Mr. Porss.

THE COURT: What is the relevancy of that?

MR. GOLDSTEIN: For the purpose of establishing whether or not he was working with Mr. Porss.

MR. STEARNS: But Mr. Porss says he was.

MR. GOLDSTEIN: I don't care what Mr. Porss says.

MR. STEARNS: You are reading this then to impeach your own witness, is that right?

MR. GOLDSTEIN: I am reading to impeach a witness that you called Mr. Schmidt, who has told everybody that there was no accident to Mr. Porss when he was working with him, and now tells us that he was working during the morning and the early afternoon and not late at night when Mr. Porss was.

THE COURT: Stop your protesting and go ahead.

MR. GOLDSTEIN:

"Q Did he have long hair or short hair, and what color was it, if you recall?

"A His hair was kind of light. It was not blond, but it was a light colored hair."

Page 28:

"Q And as far as you know there was no accident at all?

"A No one ever said anything about it, anyway."

Page 29:

"Q Is it a fact that they don't have to tell that they were hurt, if it is an AB?

"A They don't have to tell me. No, they don't.

"Q You weren't over Mr. Porss in this operation in any way, were you? Were you his superior for the purpose of this operation?

"A No, the boatswain.

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"Q You were working alongside each other, you say?

"A Yes.

"Q You recall that you were working with Mr. Porss?

"A Yes.

"Q Were you working with Mr. Porss one day or three days or four days or five days?

"A Until the tanks were cleaned out. I would say, all told, I would say I believe it was roughly three days at the most.

"Q Do you remember working with him all three days?

"A Yes."

Now, on page 31:

"Q Do you remember that Mr. Wherrity was working with you and Mr. Pross?

"A Yes.

"Q For those three days?

"A Yes.

"Q Do you remember him working right alongside you, sir?

"A Yes, yes, it always takes three men to operate the butterworth system."

Page 32, line 12:

"Q Were you told at one point that Mr. Porss claimed that he had an injury?

"A No.

"Q You were never told that on the ship at all?

"A Were you ever told that by the boatswain the following day?

"A No.

"Q Were you ever told that at anytime after the date of the claimed accident?

"A No.

"Q You recall that Mr. Porss worked with you?

"A Yes.

"Q Right up to the point that he left the ship?

"A Yes.

"Q Do you know why he left the ship?

"A Do I know why he left the ship?

"Q Do you know why?

"A No, I don't."

Page 38, line 9:

"Q Have you ever picked up or helped to pick up the hose that had some water in it?

"A Yes."

Line 22:

"Q Does the outside of the hose get too hot for you to handle?

"A Sometimes. I mean with your bare hands. We

always use gloves.

"Q Is it too hot to handle with gloves?

"A No.

"Q You could pull up the hose with water if you had to or wanted to?"

MR. STEARNS: Objection, your Honor. There is no testimony here: there was any water in the hose. This is pure speculation as to what Mr. Goldstein suggests.

THE COURT: The objection was as to the form, wasn't it?

MR. STEARNS: Yes, sir, but since the plaintiff has not testified at this trial of any water in any hose, any question about water in the hose is irrelevant and I think prejudicial.

THE COURT: Well, the form of the question is bad. Sustained.

MR. GOLDSTEIN: If your Honor please, the form of the question, the objection to the form of the question was waived by the stipulations at the beginni .

THE COURT: Where are the stipulations?

MR. GOLDSTEIN: I'm sorry. Except as to the form. You are right. Sorry.

What is wrong with the form, if your Honor please? This is cross-examination, your Honor.

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THE COURT: "If you had to or wanted to?" I don't know what kind of a condition that means.

Go on.

MR. GOLDSTEIN: The answer is given, sir. The witness knew what I asked and he answered it.

If your Honor will read, your Honor will see that there is a complete and total answer to that question.

THE COURT: Well, that, of course, doesn't necessarily mean that the form is perfected. Lots of times that might occur. I will take it, however, there may be some problem about it.

MR. GOLDSTEIN: All right, sir.

"A If I wanted to? I wouldn't. I wouldn't unless there is very little in the hose.

"Q Very little would mean what to you, sir, in terms of weight?

"A Probably -- I don't know. Probably five or six pounds.

"Q You mentioned that you could not pick up more than fifty pounds yourself?

"A I probably could, but I say I never do, because I am not that strong.

"Q Is there anything wrong with your back or your legs or anything of that sort?

"A No.

"Q Have you ever had an injury to your back or legs?

"A No.

"Q I take it, then, that fifty pounds is the weight that you feel is basically safe and a maximum weight for you to pick up?

"A Yes.

"Q If you are the middle man of the three men that you mentioned picking up everything you are the one who is actually picking up both the hose and the line, is that correct?

"A That is correct.

"Q I gather that you take your hand, which is inside the glove that you say you use, and you wrap that hand around the hose?

"A Yes.

"Q And you take your other hand, inside the other glove, and you wrap that hand around the line and you pull them both up at the same time (indicating)?

"A Yes, but you don't actually put your whole hand around the line; you just grip it, both hands, so that you never have a complete hold on the hose or the line.

"Q What are you doing then? Gripping it with your finger tips?

"A No, because the man on the line and the man on the hose are the ones holding the strain.

"Q I want to know what you are doing? Are you gripping it with your finger tips?

"A Yes, roughly, mostly your fingers, as far back to your knuckles.

"Q What happens on this is that they are expecting you to pull up the hose and line, the additional number of inches or feet, however long, however much you can pull up at one movement, and then they take up the slack after you complete the pulling up procedure, is that correct?

"A This is a fast procedure, though.

"Q I understand it is, but the procedure starts, as I understand you, with them holding the line.

"A Right.

"Q So that it is basically taut?

"A Yes.

"Q And the same goes for the hose?

"A Right.

"Q And then you are pulling up more line and hose and after you finish pulling it up, then they make it taut again?

"A Yes.

"Q Is that basically the type of operation it was?

"A Yes, just to keep the slack up.

"Q So that it is basically you who pulls up the line and the hose and they hold it.

"MR. STEARNS: Assuming he is the middle man?

"MR. GOLDSTEIN: Yes.

"MR. STEARNS: The middle man does it.

"Q And then they tighten the hose and the line after you finish that pulling up procedure?

"A Yes.

"Q That goes on over and over again until the hose and line are pulled up.

"A Yes.

"Q Is that basically the system?

"A Yes.

"Q You say you do this not by actually gripping the hose and the line but by sort of cradling the hose and the line in your finger tips?

"A Yes.

"Q Is that correct?

"A Yes, because the hose and the line are on at angle.

"Q I see. You mean that they are being pulled out to a different position, one for each of the men on either side of you? Is that correct?

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"A Yes.

"Q One is going off to your left and one to your right?

"A Yes. But they come up evenly."

And on line 12:

"Q You are stooped over.

"A Right.

"Q And you pull up as much line and hose as you can cradle in your hands without actually gripping the line and hose?

"A Yes."

MR. STEARNS: At this time I renew my objection to the word "grip." I think it's vague in the context of these questions.

THE COURT: You object to the use of the word "gripping," is that it?

MR. STEARNS: Well, it's too minor to waste time with, your Honor. I will withdraw the objection.

THE COURT: All right. Go ahead.

MR. GOLDSTEIN:

"Q Is that correct? Without actually gripping it you cradle it and pull it in?

"A I have no pressure on the hose or the line when this is coming up. It is like putting something under

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that hook (indicating). I am depending solely on the man with the line and the man with the hose to take the slack up.

"Q They are taking the slack up after you complete your pulling up procedures?

"A Yes.

"Q During your pulling up procedures how is the line slack or the hose slack being taken up?

"A Each individual takes the slack up as I bring it up.

"Q You just testified that they took it up after you completed pulling it up.

"A Not a completion. As I come up they are taking the slack in. I don't pull up the hose and then stop for them" --

THE COURT: "I don't pick up" --

MR. GOLDSTEIN: I'm sorry.

"I don't pick up the hose and then stop for them to take up the slack. It is a continuous routine."

Page 46, line 18:

"Q Mr. Schmidt, when the sprinkling system is going on, that is the butterworthing operation is actually going on, the water is spraying out in all directions?

"A That is right.

"Q Is it also spraying upward?

"A Yes.

"Q I take it, then, that it is wetting the hose and the line?

"A Wetting the hose and the line?

"Q Yes.

"A By all means, yes.

"Q So that when you take the hose and the line out the tank, it is wet, isn't it?

"A Yes."

Line 12:

"Q It is wet?"

MR. STEARNS: Your Honor, may I now withdraw my objection to the form and ask the context references of the next question be read?

THE COURT: On 47?

MR. STEARNS: 47. I am asking for the reading of 47, line 9.

THE COURT: Yes, read line 9.

MR. GOLDSTEIN: Your Honor is directing me?

THE COURT: Yes, I do.

MR. GOLDSTEIN:

"Q Is the line at all slippery?

"MR. STEARNS: Objection to the form.

"A No.

"Q It is wet?

"A It is wet but it is not slippery."

Line 24:

"Q You mean the two men are holding? You are actually pulling?

"Q Assuming you are the center man?

"A Yes.

"Q So you are pulling up, aren't you?

"A Yes. And with leather palm gloves none of that is slippery."

Line 16:

"Q The hose comes to rest on the deck, is that correct, right around the cover hole?

"A After we are finished on butterworthing.

"Q After you pull it out?

"A You set your machine out and get it ready for the other tank, whatever one you are getting into.

"Q I am not talking about after you completed pulling it out. As you are pulling the hose out it ultimately comes to rest on the deck?

"A Yes.

"Q The wet hose?

"A Yes.

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"Q And the wet line ultimately comes to rest on the deck?

"A Yes.

"Q Is the deck itself wet?

"A Occasionally.

"Q And of course there is still some water coming out of the bottom of the machine, isn't there?

"A Yes, and in many cases you even have sprays coming from the sea, which makes it wet.

"Q But in addition to the spray from the sea there is water coming from the system that comes to rest on the deck?

From the hose and from the line and from the battleworthing machine itself?

"A Yes."

Line 24:

"Q It is not drawn up dry by any means, the hole operation is dealing with wet gear, wet machinery?

"A Yes.

"Q Isn't that true, sir?

"A Yes."

Page 51, line 11:

"Q But, again, sir, the entire operation is being carried out with water about you?

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"A Yes."

MR. STEARNS: Your Honor, I am going to object to this because there is absolutely no claim made at any time in this case that there was anything wrong with the deck of the ship.

THE COURT: Is there, counsellor?

MR. STEARNS: No.

THE COURT: He says there is no claim about any slippery deck.

MR. STEARNS: There is no claim of any slip. Mr. Goldstein is dealing in impossibilities here.

MR. GOLDSTEIN: I am not dealing --

THE COURT: I asked you is there any claim in the record here that he slipped --

MR. GOLDSTEIN: The claim is --

THE COURT: Will you wait until I finish my question.

MR. GOLDSTEIN: Sorry, sir.

THE COURT:--either in the complaint or any pre-trial order, or anywhere else?

MR. GOLDSTEIN: The claim is that Mr. Schmidt

THE COURT: Don't tell me what it is. Tell me if there is a claim that he slipped.

MR. GOLDSTEIN: Yes, sir.

MR. STEARNS: Point to it.

MR. GOLDSTEIN: I have to point to it. Don't tell me what to do.

THE COURT: You don't have to.

MR. GOLDSTEIN: Does your Honor want me to?

THE COURT: Yes, I want you to.

MR. GOLDSTEIN: May I see my complaint, sir, and may I see my answers to interrogatories, and we will point out where the plaintiff claims that Mr. Schmidt and Mr. Wherrity both --

THE COURT: Will you please stop speaking quite so rapidly.

What is it that you want? The complaint?

MR. GOLDSTEIN: The complaint and my answers to their interrogatories.

THE COURT: This is the complaint.

MR. GOLDSTEIN: Thank you, sir.

THE COURT: Take that first. One thing at a time.

MR. GOLDSTEIN: That's the pre-trial order. I will take a look at that also.

THE COURT: Go right ahead.

(Pause.)

THE COURT: Tell me where there is a claim of

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slipping on the deck. If so, show it to me.

Do you find anything in the complaint?

MR. GOLDSTEIN: No, sir, the complaint is in the usual general terms that do not describe any injury.

THE COURT: All right, there is nothing in it about slipping.

MR. GOLDSTEIN: And the complaint doesn't have to have it, Judge, as your Honor well knows.

THE COURT: I beg your pardon, sir. Is there anything in the pre-trial order?

MR. GOLDSTEIN: Yes, sir.

THE COURT: Let's see that. Mark it, will you, and let me see it. All I am trying to do is see if there was notice given somewhere.

Where does it say anything about -- underline anything about the deck, will you please?

(Pause.)

MR. GOLDSTEIN: That the manner and method of the operation was not safe. The failure to determine the manner and the method of the operation was safe.

THE COURT: Well, I will sustain the objection.

MR. GOLDSTEIN: Is your Honor denying me the right to prove these things?

THE COURT: I do, this particular thing.

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MR. GOLDSTEIN: This is the defendant's witness, not my witness.

MR. STEARNS: Your Honor, can I --

THE COURT: I don't care whose witness it is.

MR. STEARNS: Can I read the plaintiff's deposition on the question of slipping?

THE COURT: Not yet. There is no claim here about it.

MR. GOLDSTEIN: There is no claim that Mr. Wherrit -- you tell me there is no claim. Do you want me to answer you without giving me some phrase that I can't answer because it doesn't show on the record. Does your Honor wish me to answer you or do you just want me to keep quiet and allow you to destroy a lawsuit?

THE COURT: Don't ask such foolish questions.

MR. GOLDSTEIN: They are not foolish, Judge. They are not foolish. I have been here three days and I am watching what's going on.

THE COURT: So am I.

MR. GOLDSTEIN: Yes, I know, Judge. Your track record speaks for itself.

THE COURT: Thank you, and will you disregard that, members of the jury. My track record, so-called, is none of anybody's business here.

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MR. GOLDSTEIN: If your Honor please, I move for a mistrial.

THE COURT: Denied.

Now, I want to ask you this:--I don't think you have answered me -- Is there any place where there is a claim made where there was a slippery deck?

MR. GOLDSTEIN: There is a claim made that Mr. Sherrity and Mr. Schmidt did not hold the hose and the line that they were supposed to hold. The plaintiff does not have to prove why they didn't. He only has to prove that, in fact, they didn't; and if this jury believes that they did not hold it when they were supposed to, then I have proved my case.

THE COURT: Well, I don't agree with you.

Now, what page are we on again? Will you please recall the question.

MR. STEARNS: Your Honor, may I object to Mr. Goldstein's shouting and to his statements?

THE COURT: Yes. You don't need to shout to me or anybody else in this courtroom. Disregard it, members of the jury.

Now, what is the page and what is the particular question, again?

(No response.)

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THE COURT: Mr. Stearns, will you tell him.

MR. STEARNS: Page 46, I believe.

MR. GOLDSTEIN: We are past that.

THE COURT: Page 48.

MR. STEARNS: 49

MR. GOLDSTEIN: Page 49, line 24

MR. STEARNS: It's over on 51.

THE COURT: Something about a wet deck, as I recall.

MR. GOLDSTEIN: Yes; right.

On line 11:

"Q But, again, sir, the entire operation is being carried out with water about you?

"A Yes.

"Q Water on the deck, water on the hose?

"A The decks are always wet, yes.

"Q And your shoes are always wet?

"A You are supposed to wear boots."

THE COURT: Well, I don't hear from you, Mr. Stearns?

MR. STEARNS: Well, I don't --

MR. GOLDSTEIN: No further questions.

MR. STEARNS: Have you rested?

MR. GOLDSTEIN: Do you want to read any of this

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THE COURT: Do you object to the questions, and if so, why, and to what questions?

MR. STEARNS: No, your Honor, I am not going to take time to object to the questions.

THE COURT: All right, go ahead with the next question. You have read certain ones.

MR. STEARNS: He has concluded reading the deposition and now I inquire: I am prepared to go ahead and read as I did with the other, but I would now inquire whether counsel for plaintiff has any more proof on the question of liability.

THE COURT: Is your proof ended?

MR. GOLDSTEIN: Judge, I have now completed reading this deposition. Does Mr. Stearns want to read it?

THE COURT: All right. I will let him read it.

You may read it. You might as well do it now and get it over with.

The first page, please.

MR. STEARNS: Page 3, line 13:

"Q The YUKON " --

That's the ship that Mr. Schmidt was on at the time of his deposition in January.

"The YUKON is an oceangoing vessel, is it not?

"A Yes.

"Q Where is the vessel now?

"A Carteret, New Jersey."

Page 4, line 4:

"Q What is the expected itinerary of the YUKON.

"MR. GOLDSTEIN: I will concede that I understand Mr. Schmidt will not be back for the trial, and I will accept that understanding.

"Q You are going to sea with the ship?

"A Yes. Leaving tonight at seven, yes."

Line 16:

"Q When did you first go to sea?

"A October of 1945."

Line 23:

"Q Who owned the OVERSEAS ALEUTIAN?

"A That was the Maritime Overseas.

"Q Is Maritime Overseas a separate and distinct corporation from Hudson Waterways?

"A Yes.

"Q You no longer work for Maritime Overseas Corporation?

"A No, I don't."

Page 14, line 14 -- speaking of the three men doing the job:

"Q Is there room for a fourth man?

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Yes, but it is not a necessity, and the only time a fourth man could be coming is if the hose is getting piled up behind the man who is holding the strain, and he will just stretch it out, but as far as any labor is involved or anything as far as pulling it up or anything like that, no.

Q I have told you, have I not, Mr. Schmidt, that Leroy Porss claims that while engaged in lifting the Lucas Worth hose from one of the tanks on the ship on June 8, 1971, that you and Mr. Francis Wherrity both, during the lifting operation, suddenly let go both the hose and the line causing him to bear full weight of the hose and the machine?

MR. GOLDSTEIN: Objection.

MR. STEARNS: Your Honor, I think I am permitted to read that.

THE COURT: All right, go ahead and read it. Overruled.

"MR. GOLDSTEIN: Objection. It is not our claim.

"MR. STEARNS: It is one of the things that has been said in the deposition, is it not?

"MR. GOLDSTEIN: Not in any way."

MR. GOLDSTEIN: "Not in that way."

MR. STEARN: "Not in that way."

THE COURT: I am going to take it. It relates

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to the general claim.

MR. GOLDSTEIN: It relates to the attorneys' statement of the general claim, the two attorneys.

THE COURT: I think it is the general claim.

MR. GOLDSTEIN: Which your Honor has stated over and over again is not evidence for this jury to hear, and now your Honor is deliberately letting this jury hear it. How far afield does your Honor wish to go?

THE COURT: You are greatly confused.

MR. GOLDSTEIN: I am not confused, Judge.

THE COURT: Will you please calm down and don't shout?

You may state the question, counsellor.

MR. STEARNS:

"MR. STEARNS: All I can say is it is my understanding of the claim.

"MR. GOLDSTEIN: You are entitled to have your understanding, but I will object and raise the objection at the time of the trial."

MR. GOLDSTEIN: Now, if your Honor please, may I now move for a mistrial on the ground that your Honor has deliberately allowed to come into this record, statements by attorneys which your Honor knows are not proper evidence over an objection.

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THE COURT: The motion for a mistrial is denied.

Proceed, Mr. Stearns.

MR. STEARNS:

"Q Did that occurrence happen?

"A No, it never did happen.

"Q Did you ever see Mr. Porss at anytime during the period that you were a shipmate with him on the OVERSEAS ALEUTIAN in early June, 1971, did you ever see him yanked off his feet while he, you and Wherrity were handling the Batterworth hose?

"A No.

"Q Did you ever witness an accident involving Leroy Porss of any kind at anytime during his voyage?

"A No.

"Q Has Mr. Porss ever made a complaint to you at anytime during this voyage or anytime since of any complaint of injury to his back?

"A No.

"Q Did you ever scheme or plan with any member of the crew of the OVERSEAS ALEUTIAN to suddenly let go the Batterworth hose and line so that Mr. Porss would bear the whole weight of this line?"

MR. GOLDSTEIN: Objection to this question.

THE COURT: What is the objection to that one?

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MR. GOLDSTEIN: The objection is that there is no claim that there has ever been any scheme or plan with any member of the crew to suddenly let go of the butterworth hose.

THE COURT: Sustained.

MR. STEARNS:

"Q Mr. Schmidt, I ask you to assume that plaintiff claims that this hose and butterworthing machine had been lowered fully into the number three port wing tank, and that while the hose was being moved on the second port and the second stroke, how much would that much of the hose in the tank, would the hose and the butterworth machine weigh, approximately?

"A I would say anywhere -- I would say sixty pounds at the most."

Page 17, line 7:

"Q At anytime during this voyage in early June, 1971, were the butterworth hose and machine raised or lowered without the boatswain being present?

"A No, never."

Page 18, line 23:

THE COURT: This returns to Mr. Goldstein's questions?

MR. STEARNS: Yes, this is Mr. Goldstein's questions.

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THE COURT: Line 23, page 18.

MR. STEARNS: Yes, sir.

THE COURT: All right.

MR. STEARNS:

"Q You have spoken to Mr. Stearns about this matter, haven't you?

"A Who?

"Q Mr. Stearns.

"MR. STEARNS: That is me.

"A I am glad I know your name. Yes, I have.

"Q When did you start speaking to him about it? When is the first time you spoke to him?

"A Today, I guess. It is the first time I have ever seen him."

MR. GOLDSTEIN: Judge, in keeping with the concept of this Court, that I should, that the other attorney should, ask at this time to continue reading for continuity, may I ask that Mr. Stearns continue to read?

THE COURT: Where are we now, page 19?

MR. GOLDSTEIN: Page 19, on line 9, the next question.

THE COURT: You want line 9 read?

MR. GOLDSTEIN: Yes.

THE COURT: I don't know. I will look at it to

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it's a part of the context. That's the test, and it is reasonable.

MR. STEARNS: I am willing to continue reading.

THE COURT: All right, read it.

MR. STEARNS: This is now line 9:

"Q Did you speak to anybody from his office or associated with the ship about your testimony today?

"A I spoke to somebody in Baltimore.

"Q What was his name?

"A I don't know.

"Q Did he tell you he was from the ship or the shipping company or its representative?

"A He said he was a representative of the Overseas Maritime Overseas.

"Q That is the name of the company that owns the OVERSEAS ALEUTIAN, isn't it?

"A Right.

"Q You had a long talk with him?

"A Not specifically a long talk. He was just asking me if I knew anything about the case of the boy who was supposed to have got hurt.

"Q Did he ask you for a statement?

"A Yes, he did.

"Q Did you give him a statement?

"A Yes, I did."

At that time the statement was handed to Mr. Goldstein.

And he then asks:

"Q This is the statement that you gave?

"A Yes, it is.

"Q Is that your signature on the statement?

"A Yes, it is.

"Q Is that your handwriting?

"A No, it is not.

"Q Is there any part of that statement other than your signature that you wrote?

"A I just wrote my signature.

"Q Did you read it before you signed your name?

"A Yes.

"Q You read it carefully?

"A Yes.

"Q Did you make any corrections?

"A No.

"Q I notice that there are three words crossed out and written on.

"A What are you asking?

"Q I notice there are some scratchouts over words. Did you do that, sir?

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"A No, I didn't do that.

"Q Those were made by the man who wrote the statement, whoever he is.

"A Yes."

And then I supplied the name.

MR. STEARNS: Should I stop?

MR. GOLDSTEIN: Yes, I think you covered that.

MR. STEARNS:

"Q Can you describe him for us?"

Page 25, line 20.

THE COURT: Who is "him"?

MR. STEARNS: That is there Porss, is that true, Mr. Goldstein?

MR. GOLDSTEIN: Yes.

THE COURT: All right.

MR. STEARNS:

"A Well, I know he came from some foreign --

"Q Suppose I stand up and you describe him as to height," --

MR. GOLDSTEIN: And you described him as to height, weight and looks.

MR. STEARNS: --"as related to my looks, height and weight. Was he as tall as me or shorter or taller?"

And then there is a discussion about Mr.

Goldstein's height.

"A I am not too good at giving descriptions, but I can picture him myself. He was light complexion. I knew that he was either Estonian or Latvian, one of those countries over there. I guess he could be five nine. I wouldn't know the difference between five nine and five six.

"Q That is the reason I stood up, to give you some way of estimating his height as against mine. Do you think he is basically as tall as I am?

"A Yes."

Page 27, line 24. Question by Mr. Goldstein.

"Q As I understand it, what you are telling us is that your recollection at this time is that"-- objection to form which I now waive -- "that you did not have any accident with the hose and the line as far as you can recall it.

"A That is right, yes.

"Q Is that basically what your testimony is?

"A Yes.

"Q And as far as you know there was no accident at all?

"A No one ever said anything about it, anyway."

THE COURT: Is there anything before line 9 read

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there?

MR. STEARNS: I just read something that I think has been read. That's at line 9, "As far as."

THE COURT: All right.

MR. STEARNS: By Mr. Goldstein.

"Q You don't recall that it should take four?" -- talking again about the operation.

MR. GOLDSTEIN: Where are we?

MR. STEARNS: Page 31, line 12.

THE COURT: That's been asked by counsel. All right.

MR. STEARNS:

"Q You don't recall that it should take four?

"A That it should take four?

"Q Yes.

"A No, I have never worked with four people.

"Q You worked only with three? That is you and two other AB's?

"A Occasionally somebody could come over and take away the slack from the hose, if it's coiled up behind a man, but it is a rare occasion.

"Q Isn't that a necessity to avoid tripping over the hose?

"A No, because mostly the hose will fall out by

themselves."

Page 33, line 9:

"Q Did anybody ask you for a statement while you were aboard the ship?

"A No. That is why no one knew about the accident.

"Q When did you first learn about the accident?

"A Last summer, I believe it was."

MR. GOLDSTEIN: Do we want to continue on page 33 and read about being contacted two years ago?

MR. STEARNS: Anything you like.

33 beginning where?

MR. GOLDSTEIN: Line 18.

MR. STEARNS:

"Q Who contacted you two years ago?

"A I don't know. Somebody from Boston.

"Q Was he also a representative of Maritime Overseas?

"A He didn't say, and I didn't want to talk to him.

"Q He did talk to you about the accident.

"A He asked me if I knew anything about the accident and I said no, and I hung up.

"Q That was by telephone?

"A Yes.

"Q The next time, I take it, that you were contacted

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was that time in Baltimore?

"A Yes.

"Q That was the time you gave the statement?

"A Yes.

"Q The third time that you were contacted was when, sir?

"A This morning.

"Q Haven't you been contacted before this morning to come here today?

"A No, only from Baltimore they told me to come here.

"Q Did they ever tell you to come into New York on Sunday?

"A On Sunday?

"Q On a Sunday to take the deposition.

"A No."

MR. STEARNS: Do you insist on this?

MR. GOLDSTEIN: No. I think that covers that.

MR. STEARNS: 36, line 24:

"Q Mr.Schmidt, did you say that the weight of the hose of some forty feet and the line at the butterworthing system itself was a total of sixty pounds?

"A I doubt very much whether it even weighs that much, but I am saying sixty pounds, because I am lucky if

I can pick up a fifty pound bag of potatoes."

MR. GOLDSTEIN: Would you read the next question, please.

MR. STEARNS: No, I'm not going to read that.

Page 50, line -- no, I am going to pass on to something else. I am not going to read from page 50. I will pass on to something else.

THE COURT: Where are we going now?

MR. STEARNS: 56, line 14.

"Q Just to make absolutely certain, is it your testimony that as the middle man bent down to take hold of both the hose and the line that the two other men on his left and right would be maintaining some degree of tension on both the hose and the line?

"A That is right.

"Q Is that correct?

"A Yes."

MR. STEARNS: Page 55, line 6:

"Q You are paid additional money for overtime?

"A Yes.

"Q A record is kept of your overtime hours?

"A Yes.

"Q Your paycheck, or the amount of the cash they give you, during the pay-off, depends upon how many overtime

hours you worked, is that right?

"A That is right.

"Q Do you know whether aboard the OVERSEAS ALEUTIAN in June, 1971 such records of overtime work were kept?

"A Yes, they have to keep them for tax purposes.

"Q Do these overtime records indicate what overtime hours you may have worked aboard the ship?

"A Yes.

"Q Mr. Goldstein asked you about certain hours that you worked during the voyage to Pilottown in June, 1971. What was your watch, first of all?

"A Twelve to four.

"Q Do you know whether on June 8, 1971 you may have worked overtime after 5:00 p.m.?

"A Yes, it's possible.

"Q Would this fact be reflected in your overtime records for the voyage?

"A Yes, they would.

"Q Is it possible that you worked as late on June 8, 1971 as twelve o'clock midnight?

"A Well, yes, it is possible."

Page 56, line 25:

"Q Were you served with a subpoena?

"A Yes.

"Q When was that served on you?

"A When?

"Q Yes?

"A Today."

I have nothing further, your Honor.

THE COURT: All right.

Do you want to read anything?

MR. GOLDSTEIN: Page 37, yes, sir.

THE COURT: What page, please?

MR. GOLDSTEIN: 37, the first question on line 7.

If your Honor please, Mr. Stearns read the question before, concerning the weight of the hose as being the total of 60 pounds.

THE COURT: Yes, it's been read.

MR. GOLDSTEIN: And then the following question that wasn't read:

"Q Would that be when the hose is dry or when it has any water in it?

"A The hoses are dry, usually, or when the water drains out of it. You don't usually pull the hose up until they lay there for a few minutes."

MR. STEARNS: Your Honor, I object to the reading of this question on the grounds that there is no

"Schmidt"

testimony from plaintiff that there was any water in the hose.

THE COURT: Overruled. It relates to this other answer.

(Pause.)

THE COURT: Anything else, counsellor?

MR. GOLDSTEIN: No, sir, subject to the calling of Dr. Seaman as a witness and rebuttal at the end of the case, the plaintiff rests.

THE COURT: So that the only witness as far as you know as to your direct case is Dr. Seaman, correct?

MR. GOLDSTEIN: That's correct, on my direct case.

THE COURT: And tomorrow at 10:00 he will be here, is that correct?

MR. GOLDSTEIN: Yes, sir.

THE COURT: Very well, then we will suspend at this point, members of the jury. Come back a little before 10:00 and continue to heed my instructions.

MR. STEARNS: Your Honor, may I ask that I read, be permitted at this time as part of my case, to read three questions from plaintiff's deposition, in context with what has been discussed?

THE COURT: Is there any objection to taking

something of the defendant's case here now, Mr. Goldstein.

MR. GOLDSTEIN: Not as far as I am concerned.

THE COURT: All right. You are the only one that might object.

What deposition?

MR. STEARNS: Page 33.

THE COURT: Of?

MR. STEARNS: Plaintiff's deposition, under oath, August 16, 1972.

THE COURT: I don't have it here. We don't have it.

MR. STEARNS: I have an extra copy (Handing).

THE COURT: Thank you.

All right, tell me the page again.

MR. STEARNS: 33.

THE COURT: Line?

MR. STEARNS: 12.

THE COURT: Yes?

MR. STEARNS: This is the attorney of the defendant, to the plaintiff:

"Q Tell me now, was there anything on the deck, any grease or oil or slippery stuff that made you slip or was it just this pull?"

MR. GOLDSTEIN: If your Honor please, I object to

the way that it was read: "that made you slip." The question was directed to the plaintiff.

MR. STEARNS: Right: "you slip."

THE COURT: Well, read the question again so that we know.

MR. STEARNS:

"Q Tell me now, was there anything on the deck, any grease or oil or slippery stuff that made you slip or was it just this pull?

"A The weight.

"Q Just the weight?

"A The weight pulled me down."

Now, over on 34, on line 15. I will go to line 12:

"Q Was the deck dry?

"A Well, it is always water on it when you work on butterworthing.

"Q You didn't slip on that? It wasn't a slippery deck that caused your accident, is that it?

"A No, sir. Unless the other guys slipped, I don't know.

"Q And you never asked either Schmidt or Frank why they let the hose and the line go, is that right, you never asked them that?

"A No, sir.

"Q Did they ever tell you?

"A No, sir. We didn't talk about this accident at all till the next morning I asked Schmidt, you know, when they, the next morning when they called me for watch, you know, watch duty, that's when I couldn't get up no more."

MR. STEARNS: Your Honor, I have a witness outside whose testimony would be brief. I know your Honor wants to --

THE COURT: All right, call him, then.

A L B E R T I S A A C, called as a witness by the defendant, being first duly sworn, testified as follows:

MR. GOLDSTEIN: If your Honor please, I should like to look at the pre-trial order to see if this witness's name is on the list.

THE COURT: Go ahead and look at it. Have you got it? Have you got a copy? Maybe it's here. Here you are (Handing).

(Pause.)

MR. GOLDSTEIN: I don't know who Mr. Isaac is but his name is not on the list.

MR. STEARNS: He is an expert on butterworthing systems.

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THE COURT: Does his name appear here?

MR. STEARNS: Not by name, but the designation of an expert on butterworthing systems appears thereon.

THE COURT: All right, that's here.

Proceed direct examination by Mr. Stearns.

DIRECT EXAMINATION

BY MR. STEARNS:

Q What is your occupation, Mr. Isaac?

A I am a marine expediter for oil tankers, which, in plain English, means that I am an expediter for changing cargoes; upgrading, for instance, from oil to clean oil; from gasoline to naphtha; or any kind of upgrading of cargoes.

Q Does this work involve supervising tank cleaning?

A It certainly does.

MR. GOLDSTEIN: If your Honor please, I ask that Mr. Stearns not lead the witness.

THE COURT: Oh, it's immaterial. That is a perfunctory question.

Go ahead, counsellor.

Q And are you familiar with the so-called "butterworthing" operation?

A Of course.

Q Did I ask you or did you, as a matter of fact,

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suggest that a butterworth machine be brought into the courtroom today?

A Yes.

Q Did you bring one?

A I did so.

MR. STEARNS: May we mark it.

Before the clerk comes over:

Q Are you familiar with the OVERSEAS ALEUTIAN?

A I am.

Q Have you been on that ship?

A Yes, numerous times.

Q And were you on the ship in 1971?

A Voyage 13, I was on.

Q And what period of time was that?

THE COURT: How long, you mean.

MR. STEARNS: No. What period of time. When was Voyage 13?

A July; I would say the middle of July of 1971.

Q Now, referring to the butterworth machine that is being marked as Exhibit --

(Defendant's Exhibit F marked for identification.)

Q Sir, is that butterworth machine the same kind of machine that was on the OVERSEAS ALEUTIAN in June, 1971?

A Not this same one, but a similar one.

Q Is it similar in all respects?

A Yes.

Q It's a copy?

A A copy, yes. They are being used on all Maritime Overseas ships.

MR. STEARNS: I now offer this in evidence, your Honor, as Defendant's Exhibit F.

MR. GOLDSTEIN: May I see it?

THE COURT: Yes.

(Pause.)

MR. GOLDSTEIN: No objection.

(Defendant's Exhibit F for identification received in evidence.)

Q Mr. Isaac, looking at this exhibit, there is a top part, is there not, that screws off?

A Yes.

Q Did you weigh this butterworth machine without the cap on it?

A Yes, sir.

Q And what does it weigh?

A Thirty-five-and-a-half pounds. I weighed it yesterday morning.

Q Are you familiar with the union contract in force

in June 1971, regarding butterworthing procedures on the OVERSEAS ALEUTIAN?

A I am.

Q And how many men did that contract provide for to do a butterworthing job?

A Three men.

Q The OVERSEAS ALEUTIAN was a SIU ship. What is the SIU?

A Seafarers International Union of North America.

Q And do they represent crew members?

A Crew members only.

Q And crew members are people such as ABs, deck maintenance people, and so forth; is that right?

A Also engine and deck department, engine and stewards department.

Q The so-called "unlisted" personnel?

A Unlisted personnel only.

MR. STEARNS: I have no further questions.

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. GOLDSTEIN:

Q I take it, Mr. Isaac, that you are here solely for the purpose of bringing this machine here?

MR. STEARNS: I object to the form of the question.

THE COURT: Yes, sustained as to form.

MR. GOLDSTEIN: This is cross-examination.

THE COURT: He has testified.

Q And the sole purpose of your testimony, to give us the weight of the machine as being 35 1/2 pounds, is that correct?

A If you have any further questions, I will gladly answer them.

Q I am asking you: Was that the sole purpose for Mr. Stearns asking you to come in, to give us the weight of this machine as being 35 1/2 pounds?

THE COURT: What difference does it make?

MR. STEARNS: I object.

THE COURT: Sustained.

Q Mr. Isaac, how many days were you outside the courtroom?

THE COURT: I don't know what that means.

A How many days?

Q How many days have you been there? Were you there before today?

A I was here yesterday afternoon only, for two hours.

MR. STEARNS: In view of this line of questioning, can I take this man on redirect examination and ask him

again all the procedures about how one of these procedures is handled?

THE COURT: Yes, I will give you that privilege.

You better wait then and cross-examine after he has gone further.

MR. GOLDSTEIN: I don't quite understand this, Judge.

THE COURT: He is asking for leave to return to direct examination and I am granting him leave.

Now do you understand that?

MR. GOLDSTEIN: Yes, I understand that.

THE COURT: All right.

MR. GOLDSTEIN: I will object to it and I know your Honor will note my objection to it.

THE COURT: Yes. It's on the record. However, the Court has control of these procedural matters, counsellor, and you know it just as well as I do.

MR. GOLDSTEIN: Yes, I do, Judge, I know the judge has a great amount of leeway and jurisdiction and discretion.

MR. STEARNS: Your Honor, I object to these comments.

THE COURT: Disregard the comments. I have ruled.

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FURTHER DIRECT EXAMINATION

BY MR. STEARNS:

Q Mr. Isaac, three men work on this job, is that right?

A That's correct.

Q There is a man on a line with a manila rope, is that correct?

A That's correct.

Q There is a man on the hose?

A That's correct.

Q And there is a so-called "middleman"?

A Three men.

Q And they stand close together, do they not?

A They do, very close together.

Q How close together would you say they would be normally?

A If you stand there, I will show you how close they are.

Q And the other man is here?

A The same distance.

THE COURT: Almost shoulder-to-shoulder.

THE WITNESS: Shoulder-to-shoulder.

Q When this hose is being taken out of the tank, what does the middleman do?

A The middleman braces himself on his knees like this, and he picks up the line and the hose;and the man on the hose pulls; and the man on the line pulls at the same time. It's that simple. It's a very simple job and has been going on like this --

MR. GOLDSTEIN: Objection, if your Honor please.

THE COURT: Wait a minute, now. Will you please not answer any questions until they are asked.

THE WITNESS: I'm sorry.

THE COURT: You may strike out the answer.

Q Mr. Isaac, is this standard work for deck hands on tankers, do you know?

A It certainly is.

Q And is it normal, expected part of their job?

A Yes.

Q Is it the kind of thing that they can expect to do for one or more days during the voyage of the tanker?

A It can last anytime from one day up to 15, up to 30 days.

Q And the procedure is the same, is it not?

A The same procedure.

Q And usually when they are butterworthing aboard a big tanker, how many machines would they be using?

A Standard procedure is four machines. Some tankers

nowadays can run as much as eight machines.

Q If they are running four machines--and I ask you to assume now that the plaintiff has testified that they did two tanks, I ask you to assume the normal number of machines in operation -- how many times in removing the machine from these two tanks would Mr. Porss have handled the line and the machine? How many times would this have been lifted up?

MR. GOLDSTEIN: Objection, if your Honor pleas . Mr. Porss' statement is that he used one machine, not four.

MR. STEARNS: Well, I have just elicited testimony that four are customarily used, and I am entitled, I believe, to examine this witness on the basis of not only what plaintiff says but also what is normal and customary.

MR. GOLDSTEIN: Not "normal and customary"; what was done on this ship?

THE COURT: You may ask him a hypothetical question based upon the testimony and what was shown to have been done.

Q Mr. Isaac, I ask you to assume that the plaintiff has testified that he butterworthed with these two other men two tanks, Nos. 6 and 7.

First of all, to stop there, did this ship, the OVERSEAS ALEUTIAN, have tanks numbered 6 and 7?

A No.

Q What was the highest number tank?

A Number five center, five starboard, five port; a total of fifteen tanks only.

THE COURT: What was the highest number?

THE WITNESS: Five.

THE COURT: And there were fifteen tanks?

THE WITNESS: Total. Five center tanks, five starboard tanks, five port tanks; a total of fifteen.

Q Now, again to go back, I ask you to assume that he has testified that he cleaned two other tanks, and I ask you to assume what you have testified to, that normally four machines are in operation. Now, assuming those two facts: How many times would Mr. Porss have lifted one of these machines out of the tanks?

MR. GOLDSTEIN: Objection.

THE COURT: Overruled.

A Eight times.

MR. STEARNS: Thank you. I have no further questions.

THE COURT: Is that all, counsellor, now?

MR. STEARNS: Yes, sir.

THE COURT: You are sure?

MR. STEARNS: Yes.

THE COURT: Don't come back and ask me to open it up again.

All right, cross-examination.

FURTHER CROSS-EXAMINATION

BY MR. GOLDSTEIN:

Q Mr. Isaac, the question didn't tell you when Mr. Forss was hurt during the course of those eight times that you say he must have picked up, did it?

THE COURT: That's a hypothetical question.

MR. GOLDSTEIN: It certainly is.

THE COURT: That's an allegation, anyway, counsellor.

MR. GOLDSTEIN: What does that mean, Judge? I don't quite understand that. What does your Honor mean by "an allegation"?

MR. STEARNS: Your Honor, I object to this baiting of the Court by Mr. Goldstein.

THE COURT: Yes. You don't need to ask me questions, counsellor.

MR. GOLDSTEIN: Judge, I don't understand what you mean by "an allegation."

THE COURT: Just what it says. You know what the word "allegation" means. There is no allegation -- you can ask hypothetical questions if you want to.

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MR. GOLDSTEIN: I don't have to ask hypothetical questions. This is an expert. This is not my witness.

THE COURT: What is your question, please? What is your question now?

MR. GOLDSTEIN: My question now is:

Q Were you told when the accident happened to Mr. Porss in between what you now claim he did eight times on that ship?

MR. STEARNS: I object to the form. I don't understand it.

THE COURT: Sustained. I don't understand that.

Q You claim, Mr. Isaac, that Mr. Porss, as a result of the question asked you by Mr. Stearns, picked up this machine eight times, is that correct?

A If they butterworthed two tanks, he would have lifted it up eight times, because the normal procedure for butterworthing is four machines, on the OVERSEAS ALEUTIAN.

Q Very good.

Now, do you know, or was it part of the question, or do you have any information at all as to when, during that period of eight times when you say Mr. Porss would have helped pick up that machine, when he was hurt?

MR. STEARNS: Your Honor, I object to this and if counsel is in any difficulty here, I suggest that since

plaintiff had testified, before his alleged accident, that he had handled the butterworthing operation.

THE COURT: The objection is sustained, counselor.

Q Mr. Isaac, that machine is attached to a hose?

A That is correct.

Q Can you describe for us what a 2 1/2 inch hose is?

A A 2 1/2 inch hose?

Q Yes.

A It's a rubber hose, hard rubber hose; it has two female connections on either end, one goes to the butterworth machine and one goes to the fire hydrant line.

Q I see.

THE COURT: What does the 2 1/2 inch hose mean?

THE WITNESS: 2 1/2 inches in diameter. The inside diameter is two inches.

THE COURT: All right.

Q And that hose has been described as being 75 feet long. Is that approximately correct, sir?

A Yes, 75 feet.

Q They run about 75 feet?

A Yes. There are three sizes.

Q One of the sizes is 75?

A Right.

Q Now, do you know the depth of the tanks; that is the No. 3 center tank on the ALEUTIAN?

A Are we talking of the No. 3 center or 3 starboard, or 3 port?

Q The center is the --

A It makes a difference --

Q -- is what I heard --

MR. STEARNS: Well, your Honor.

Q -- this accident occurred --

THE COURT: All right. You are asking him about the depth of the No. 3 center, is that the question?

MR. GOLDSTEIN: Correct.

A 42 feet.

Q And, I take it, sir, that when the machine is lowered down into the hold, it's lowered down almost to the floor of the hold, is that correct?

A That is not quite correct because there is a lot of obstructions in the tank. Therefore you don't go any lower than 35, normally anywhere between 25 and 35 feet, no lower.

Q And if the bosun who claims he was on duty at that time said that he lowered it to about 35 feet, would you agree that that would be basically correct?

A Yes.

Q Now, Mr. Isaac, did you ever weigh the hose?

A Yes.

Q You weighed it dry or you weighed it wet?

MR. STEARNS: What do you mean "wet"? I object to the form.

A We weighed it on board the ship and it ran anywhere between 118 and 120 pounds -- the 75 feet length.

THE COURT: With or without water in it?

THE WITNESS: There could have been water in it. I'm not sure. There was some water in it, yes.

THE COURT: Some water was in it?

THE WITNESS: Yes, because we normally keep the water in the hoses. Otherwise, they get a dry rot, so the hoses normally have some water in them, yes.

Q Was this a hose in use at the time that you weighed it or was this just a hose that was hanging somewhere or being storaged away?

THE COURT: You mean was it a hose that was in use that particular minute?

THE WITNESS: All hoses are normally in use.

Q Well, that doesn't answer my question, Mr. Isaac. The question is, was that hose in use at that time? That is, would it be expected to have water in it because it

Was being used or had it sort of been hung out and allowed to dry or drip, or call it what you will?

A Well, okay. It was not in use, no.

Q Now, Mr. Isaac, are you an engineer, sir?

A No, I'm not an engineer.

Q Would you happen to know the weight of water?

THE COURT: How much water?

Q A cubic foot of water?

A No --

MR. STEARNS: I object to this. There is no testimony of water in the hose; there is no testimony of how much water was in the hose.

THE COURT: Well, I will overrule it and let him answer it if he can.

THE WITNESS: I cannot answer that question, Your Honor. I would not be correct.

Q Have you ever heard the expression, sir, that "water weighs 62 1/2 pounds a cubic foot"?

A Yes, but first you have to tell me also that there was water.

MR. STEARNS: First of all, it's 32.

MR. GOLDSTEIN: No, it's 62.

MR. STEARNS: 32.

MR. GOLDSTEIN: No, 62.

MR. STEARNS: Excuse me.

Q You don't know that weight?

A I am explaining to you --

THE COURT: Wait a minute. Will you read the question, please.

(Question read.)

MR. STEARNS: I object to the form of the question.

THE COURT: Overruled.

A My answer is that first we have to find water in the hose. Now, how can the water stay in the hose if the --

MR. GOLDSTEIN: If your Honor please, may your Honor direct the witness to answer the questions that are put to him? That's what he is here for and not to give his dissertations about things.

THE COURT: However, the form of the question might have something to do with it.

Read the last question, Mr. Reporter.

(Question read.)

THE COURT: Finish your answer if you can, sir.

MR. GOLDSTEIN: You are allowing him to finish the answer? I object on the ground that it's not responsive to any question that I asked.

THE COURT: Read back. I asked you to read the question, Mr. Reporter.

(Question read.)

THE COURT: Will you answer that?

A Yes, I heard that.

THE COURT: All right, go ahead then.

Q What was the answer?

A I heard that, yes.

Q Now, Mr. Isaac, assume, sir, if you will, that with the machine 35 feet below the level of the deck, the Losun, or anybody else who wanted to, was taking up the hose without waiting for all of the water to dissipate out --

MR. STEARNS: Objection.

THE COURT: Wait a minute, counsellor. Let him finish his question.

Q -- That while the water was, in fact, pouring out of the holes of the machine at the bottom of the 35 feet, the men were busy pulling up the hose.

Now, sir, under those circumstances, there would be some water in the hose during the time that the hose and machine were being pulled up, isn't that so?

A No.

MR. STEARNS: I object to the question.

THE COURT: He has answered it.

Q Is your statement, sir --

A My answer is no.

Q Please. Is your statement, sir, that the water would pour out of the holes instantaneously, before the man could even make the first pull up on the hose and line? Is that your statement?

A No.

Q So you agree, sir, that --

A I am not agreeing with you. No, I am disagreeing with you.

Q I know you are disagreeing. We will find out why.

A Because, number one --

Q No, no, please. Mr. Isaac, you are here to answer questions. That's what Mr. Stearns asked you to come here for. He paid you to come here, did he?

A He did not.

Q You didn't get paid at all to come here?

A No.

Q Now, Mr. Isaac, is it conceivable to you that the hose and the line and the machine could be started to be pulled up before all the water dripped out of the machine at the bottom of the butterworthing system?

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MR. STEARNS: Your Honor, I object. I object for a number of reasons:

One, that there is no testimony that that was the fact.

Two, the plaintiff has testified that he was working with two other men of equal rank.

Now, it's quite obvious from the testimony --

THE COURT: I will overrule the objection. Let him answer. Let him explain why, if you want to, later.

(Question read.)

A Number one, the normal procedure is --

Q I didn't ask you about normal procedure.

THE COURT: He asked you merely if it was conceivable.

A It could be, yes. It depends again on a lot of things. It's just not a dry cut thing like that on board a ship. It never is.

Q Very good, sir.

Has it been done just that way, Mr. Isaac?

THE COURT: What is it?

Q That from time to time they will not spend the time to watch the water drip out of the bottom of the machine before they start to pull the machine up, knowing full well, Mr. Isaac, that the water will be pouring out

as they are pulling the machine up?

MR. STEARNS: Objection.

THE COURT: Sustained. It's purely speculative.

Q Mr. Isaac, if I told you that one of the witnesses said yes, from time to time there would be water -- the quantity, that he doesn't know -- in the hose, as it was pulled up; would you agree that that is a possibility?

MR. STEARNS: Your Honor, I object to that unless he designates the witness, and try to do better at who said what and when, particularly when we have two depositions.

MR. GOLDSTEIN: That's for the jury to determine. If the jury remembers that, then the jury remembers it.

THE COURT: The objection is sustained. It is still speculative.

Q Well, would you agree, then, sir, that such a thing is done and has been done; that is, that they don't wait until all the water is out of the hose before starting to pull it up?

A It's not normal procedure.

Q I didn't ask you that, sir.

A That's what my answer is.

Q Is it done, normal or not?

A To my knowledge, no.

Q Now, you say, sir, that normal procedure would require them to wait until the water is out of the hose?

A There are two ways of pulling up a machine. One of them --

MR. GOLDSTEIN: If your Honor please, I am asking for a yes or a no answer. Can't I get it?

THE COURT: Not necessarily.

Read the question. I don't know whether it calls for one or not.

(Question read.)

Q Yes or no, Mr. Isaac.

A Maybe.

Q So that sometimes normal procedure would be for them to allow the water to remain in the hose, sir?

A No. I am trying to explain, but you don't give me a chance to explain, so why can't I explain? How can anybody understand what I am trying to say?

Q Mr. Isaac, that's what Mr. Stearns is here for. You are his witness; you are not mine.

A You are asking me all the questions.

THE COURT: Next question.

MR. GOLDSTEIN: That's his problem.

THE COURT: Next question, counsellor.

Q So that you can't tell us what normal procedure

it because of the "Maybe," isn't that true, sir? You don't know whether or not at all times the hose should be either dry or wet or, perhaps, somewhere in between?

A The normal procedure is that we are waiting for the water to be drained; also that we are cracking on the manifold, the coupling for the air to get into the hose for it to drain normally.

Q You mean customarily?

A Customarily. It is just not done that way.

Q And if it was decided to save time and not wait for all of the water to drain out, you would then consider that an unsafe practice, sir?

MR. STEARNS: Objection.

THE COURT: Sustained. Speculative.

Q Would you consider that an unsafe practice?

A But there was no time element on this voyage.

Q You don't know that, Mr. Isaac. You weren't there. What are you talking about?

MR. GOLDSTEIN: If your Honor please, I ask that the witness be ordered to answer the questions.

THE COURT: Well, if you will stop talking, maybe he can, counsellor.

I direct you to answer the question.

Now, will you read the question so we know what

(Question read.)

A No.

Q And I take it, then, that if it wasn't an unsafe practice, that it was done from time to time; that they would pick up the machine when there was still water in the hose.

THE COURT: What you are asking is: Would they somewhere, somehow, pick up the hose with the water in it?

MR. GOLDSTEIN: Yes, from time to time when they wanted to save time.

MR. STEARNS: There is no proof that there was any need to save time.

THE COURT: Wait a minute, sir. Is there an objection?

MR. STEARNS: Yes, sir.

THE COURT: Please state it.

MR. STEARNS: Objection. I object because the testimony is--the prior testimony is completely without foundation and completely fails to supply a foundation for these types of questions. Were they in a hurry? Who said anything about anybody being in a hurry? Mr. Porst had an opportunity to say that and he didn't. There is absolutely no testimony that there was any hurry.

THE COURT: Well, the real objection it seems to me is that it's a speculative question.

MR. STEARNS: Yes, sir, it's speculative, and it does not --

THE COURT: I sustain it in that form, counsellor.

MR. GOLDSTEIN: Okay.

Q Mr. Isaac, assume, if you will, sir, as a hypothetical, since you are an expert, that the bosun decided not to wait until the water had all drained out of the hose, would you, sir, have an opinion as to whether or not the bosun was performing his duties improperly?

MR. STEARNS: Objection. The testimony is that the bosun wasn't there.

THE COURT: I know, but you constantly relate to that and some of these questions are hypothetical. I am going to overrule the objection.

Now, will you answer it, Mr. Isaac?

(Question read.)

A Well, I am confused now. If the bosun wasn't there

MR. STEARNS: Mr. Isaac, assume what he says. Assume what he says.

Q Assume that the bosun was there.

MR. STEARNS: Assume that his bosun was there.

This is now a hypothetical question. If the bosun had been there.

THE WITNESS: All right.

THE COURT: This, of course, does not mean, members of the jury, that there has been proof or that you may that there has been proof one way or the other before this. This is a hypothetical question.

All right, can you answer it, Mr. Isaac?

THE WITNESS: No.

THE COURT: The answer is no.

THE WITNESS: No, I cannot answer that question because I don't know.

THE COURT: All right.

Q You mean it could be and it couldn't be?

A I don't know.

Q You don't know?

A I cannot answer that because I was not there, like you said.

Q Well, a hypothetical question isn't directed to you being there; it's directed to your expertise, Mr. Isaac, that you were submitted as an expert witness.

THE COURT: Don't argue with the witness.

Ask another question if you want to; if not, conclude.

Q So that's one area that your expertise does not go to, is that correct, sir?

A If you say so.

Q Now, Mr. Isaac, are you familiar with the rules concerning whether or not the bosun should wait until the hose drains out completely before lifting the machinery?

MR. STEARNS: I make objection for the record on the same ground stated before.

THE COURT: Are you familiar with the rules?

MR. GOLDSTEIN: Yes.

THE COURT: I don't know what rules they are.

MR. GOLDSTEIN: I don't know, either. Let's find out if there are any.

THE COURT: If you don't know, the objection is sustained. It's purely speculative.

Q Are there any rules concerning whether or not the bosun should wait until the hose is drained out thoroughly before lifting the machinery?

MR. STEARNS: Again, I object for the record.

THE COURT: I will let him answer.

A That is entirely up to the bosun who is in charge.

Q So there are no rules?

A There are rules. They are normally followed,

but not everybody is the same.

Q Now, sir, it is true, is it not, that when you are picking up the hose, and the machinery, if there is water in that hose, it is then substantially, or to a certain extent, more in weight than the weight that you gave us concerning the 118 pounds of the hose and the 35 1/2 pounds of the machine; is that correct, sir?

A If there is water in there, yes.

Q Okay.

A If.

Q And even --

THE COURT: Now, wait. Let him finish his answer, sir.

MR. GOLDSTEIN: He did.

Did you finish, Mr. Isaac?

THE COURT: No, he hadn't, as far as I know.

MR. GOLDSTEIN: He used the word "If," didn't he?

THE WITNESS: Yes.

Q Mr. Isaac, even without any water, dry--as you mentioned--just on the weight of the hose itself and the machine, you have somewhere over 150 pounds, is that correct, 118 plus 35?

A No way. That's my answer.

Number one is: 35 foot of the hose is on deck, only 35 feet. If they went to that level of 35 feet, was in the hold. Therefore, there is no way that that could weigh the amount you just mentioned.

Q I see. You mean it's only half the hose that's down in the hold?

A Of course.

Q Okay. Fine.

So that it's approximately, then, half of 118 pounds --

A Yes.

Q -- that would be down there, is that right?

A Maybe.

Q Maybe. All right.

A But mostly they cheat on that, too. To be real honest, so, I mean, you want to get so technical, so we can go, you know --

Q Well, I don't know what you mean by that, Mr. Isaac, and I am rather confused by,"if they want to cheat on that."

THE COURT: Suppose you ask the next question and skip it.

Q Mr. Isaac, in point of fact, one person is not used to raise the hose and the line, is that true, sir?

A It can be done by one person.

Q I didn't ask you that, sir.

A (No response.)

Q One person does not, according to the rules that you mentioned, --

A The contract calls for three men. Therefore, three men should be there at all times.

Q Very good. And that's for a question of safety, isn't it, of the three men?

A Yes.

Q If one man did it alone, it would be rather unsafe, wouldn't it, sir?

A I would not say so.

Q But it has been determined by the people --

A By the union agreement, for three men to handle the hose and the line.

Q That is a union agreement with the company, the company officials entered into the agreement with the union officials?

A Right.

Q And one man, as you say, holds the line, and one man holds the hose, and the middleman sweeps up the hose and line out of the tank; isn't that true, sir?

A Yes.

Q Isn't that basically what we are talking about?

A Yes.

Q And then there is a fourth man from time to time who stands behind and uncurls the hose so that the man, the third man who is pulling the hose out, has room to move, isn't that true sir?

MR. STEARNS: I object. It's totally irrelevant. Whether or not with the hose could have been Mr. Porss.

THE COURT: Sustained.

MR. GOLDSTEIN: No further questions, Mr. Isaac.

THE COURT: Any redirect, counsellor?

REDIRECT EXAMINATION

BY MR. STEARNS:

Q Mr. Isaac, how about the No. 3 port wing tank? Could that be a shallower tank?

A Well, in the wing tank, yes, it's shallower, and because of the beams in that tank; the center tanks are straight tanks and the wing tanks have more obstructions.

Q The No. 3 port wing tank would then be so much shallower than the No. 3 center tank, is that right?

A Right.

Q Can you say how much shallower?

A Oh, maybe a foot or so. It doesn't make -- but it's a difference. We cannot lower the machine as low as

would in the center tank.

MR. STEARNS: I have no further questions.

RECROSS-EXAMINATION

BY MR. GOLDSTEIN:

Q So the machine would be lowered basically the same five feet.

A Approximately 5 feet.

MR. GOLDSTEIN: Thank you.

THE COURT: All right, you are excused.

(Witness excused.)

THE COURT: Now, is there any other witness today?

MR. STEARNS: No, sir, not today.

THE COURT: Well, then, I suppose that's all we can do today until tomorrow when the doctor comes; am I right, gentlemen?

MR. GOLDSTEIN: Yes, sir; both doctors, I gather.

THE COURT: Well, that's a matter for Mr. Stearns.

MR. STEARNS: Yes, your Honor.

THE COURT: Very well, you are excused.

Counsel remain, please.

(The jury left the courtroom.)

(Time noted: 4:08 p.m.)

THE COURT: Mr. Stearns, are you holding your

[illegible] open as to your physician?

MR. STEARNS: Yes, sir, but I do think that I may call him. His testimony will be as brief as I can make it.

THE COURT: Tomorrow morning you will have him here, then, by 11:00.

MR. STEARNS: 11:30 is what I told him.

THE COURT: Well, you better get him 15 minutes earlier if you can.

MR. STEARNS: Your Honor, while the record is still open, could I, for the record, make motions?

THE COURT: Yes, sir. All right.

Now, this is made as if, after all the--partially with respect to liability--all the plaintiff's proof in; is that right?

MR. STEARNS: Yes, sir.

THE COURT: Do you agree with that?

MR. GOLDSTEIN: Yes, sir.

THE COURT: All right, make your motions.

MR. STEARNS: With that in mind, I now move to dismiss plaintiff's complaint to failure to state a prima facie case with respect to negligence and unseaworthiness.

THE COURT: You better separate the motions.

MR. STEARNS: Well, particularly as it goes to

[illegible] action of unseaworthiness. Now, unseaworthiness, [illegible] claim there was an unsafe condition that doesn't exist.

The testimony in this case, such as it has been, is that somebody suggestibly let go; that's the suggestion, let go simultaneously, a line and a hose, and as a result [illegible] claims to have been pulled forward onto his knees.

If that be the case, there is no unseaworthy condition present. This is either the negligence or deliberate act of these two individuals. There is no [illegible] action.

This is a rather unusual type case, where the [illegible] possibility of recovery for negligence when there is no unseaworthiness because there is no condition, absent **proof of incompetence, absent proof of vicious disposition of George N. Schmidt.**

THE COURT: You say there was no static existing condition which would constitute unseaworthiness?

MR. STEARNS: That's right, sir.

THE COURT: What about negligence?

MR. STEARNS: Well, negligence, then the problem [illegible] I suggested earlier to your Honor, that there is a question here of a set of facts that, although denied by plaintiff clearly, lend themselves to the inference that

deliberate act resulted in the injury. If there is a deliberate act and there is no proof of improper [illegible], then this is the kind of act that is not negligence, but is an intentional tort, and is the act, it is an act for which the ship owner is not responsible.

The unseaworthiness aspect of this case is wholly the question of the suitability of these two seamen, Frank Mulcrity and Schmidt.

The negligence case, I think, is defective.

THE COURT: What do you say is the claim here of negligence?

MR. STEARNS: The claim is -- the factual claim is, as I understand it, the sole negligence claim in plaintiff's deposition, and distilling the legal descriptions in the pre-trial order, is that this line was let go improperly.

Now, in this situation, from the facts testified to by plaintiff, the inference to be taken from them that this was deliberate is probably, or seemingly, to me, as substantial as the inference that this was a negligent act.

In other words, there was an unexplained letting go, the losing of control --

THE COURT: Does it really make any difference in the last analysis if they did something which was improper?

MR. STEARNS: Well, it would, sir. There are situations, e.g., where a fight occurs aboard ship.

THE COURT: Well, that's an entirely different kind of an animal.

MR. STEARNS: I'm trying to draw the analogy.

THE COURT: Let's not get too many such animals in it.

MR. STEARNS: This is the sole analogy:

If a seaman hits another seaman and there is no suggestion that the hitting has anything to do with carrying out orders --

THE COURT: Well, aren't there --

MR. STEARNS:--it's an improper act. There is no act.

THE COURT: There are things that a fellow seaman can do which does constitute negligence and which may affect another fellow seaman.

MR. STEARNS: Yes, there are.

THE COURT: Well, why is this? If what is said by the plaintiff's side is true, why not? I don't pass on credibility.

MR. STEARNS: That's right. The Court would have to, then, as I understand it, the logic of it, the Court would, then, have to say that there is an inference

that this was a negligent rather than a deliberate act, and I don't know that that exists.

I mean, here is a situation that lends itself to explanation in terms of --

THE COURT: Well, isn't there a basic question of fact as to whether or not the accident occurred in the manner in which the plaintiff claims it occurred, and, in fact, if any accident at all occurred?

MR. STEARNS: Yes, sir.

THE COURT: So we have some question of fact here, perhaps, credibility involved, but certainly a question of fact, don't we?

MR. STEARNS: Yes, sir.

THE COURT: All right.

MR. STEARNS: However, my argument assumes the facts as stated or testified to by the plaintiff; that is, if this did happen, without explanation, we have a situation where a man claims he has been pulled over. There is no explanation of why. The mechanical explanation has been provided. They suddenly, simultaneously let go; but there is no explanation why, or how come, as it were.

THE COURT: I am afraid I can't grant your motion on either ground on unseaworthiness or negligence. I am afraid we will have to have a jury verdict.

Do you want to say anything, counsellor?

MR. GOLDSTEIN: No, sir, in view of your Honor's decision, denying their motion, there is nothing for me to say.

THE COURT: All right.

Now, do we have it, all the requests to charge

THE CLERK: No, sir.

THE COURT: Whose is missing?

MR. GOLDSTEIN: Mine is missing, sir.

THE COURT: When do you expect to get them in, counsellor?

MR. GOLDSTEIN: I thought I was going to have it this morning, Judge --

THE COURT: Well, thought doesn't bring it up here. Will you have it tomorrow morning for certain?

MR. GOLDSTEIN: I hope so, sir.

MR. STEARNS: Your Honor --

MR. GOLDSTEIN: I have a sick secretary, Judge, and that's what I found out when I got back to my office yesterday.

THE COURT: Well, maybe you have got another secretary that isn't sick.

MR. GOLDSTEIN: I tried to arrange for somebody else to pick up her work, and the problem is whether or

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[illegible] can read her shorthand.

THE COURT: You mean read the absent secretary's shorthand?

MR. GOLDSTEIN: That's the problem, Judge.

THE COURT: All right, tomorrow.

MR. STEARNS: Your Honor, I have a Victory Carriers, Inc. medical log for the Voyage No. 129, and I would like to --

THE COURT: You want to offer it in evidence?

MR. STEARNS: Offer it in evidence.

THE COURT: Have it marked. Get that done.

MR. GOLDSTEIN: If you show it to me, I will probably agree to it.

(Defendant's Exhibit G marked for identification.)

THE COURT: We have to propose not only a special verdict but we have to propose a charge as you know, and I expect the cooperation of the lawyers in order to help us get our work done.

MR. GOLDSTEIN: Judge, I expected fully to have it. I was shocked when I got back yesterday afternoon and found out that she had left about 2:30 and was sick.

THE COURT: Expectations are futile.

MR. GOLDSTEIN: And there was nothing I could

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do at that point.

THE COURT: Well, it will delay the trial.

MR. GOLDSTEIN: Judge, if your Honor please, do I take it that your Honor's denial of their motions also includes the maintenance and cure?

THE COURT: No, no, not a thing about maintenance and cure. There has been no proof except what you put in and there has been no chance for them to put in what they want to say, so I'm not passing on any such motion.

MR. GOLDSTEIN: I see. All right, sir.

THE COURT: I will pass on it if and when it's made.

MR. STEARNS: Do you agree to the admission of that in evidence?

MR. GOLDSTEIN: I am looking.

THE COURT: Any objection to this log?

MR. STEARNS: It's a copy of a medical log of the subsequent shift. It's offered to prove that he made no complaint of pain in his back. He complained of other things but not to his back.

THE COURT: On that other vessel that he went on?

MR. STEARNS: Yes, sir.

THE COURT: Well, make up your mind, counsel.

MR. GOLDSTEIN: I will do it in two ways, Judge.

THE COURT: No.

MR. GOLDSTEIN: I will agree that this medical log makes no reference to the plaintiff's back.

THE COURT: Put the stipulation on. You state it, counsellor.

MR. STEARNS: I would like to, then, state this: This man was on the ship for the period of time that he testified to, which, as I remember, was November to March 9, 1972.

MR. GOLDSTEIN: We had agreed to the dates.

MR. STEARNS: '73; excuse me.

THE COURT: You stipulate that the plaintiff was on this other vessel -- what is it called?

MR. STEARNS: Longview Victory.

MR. GOLDSTEIN: From 11-20-72 to March 9, 1973.

THE COURT: And what about it?

MR. GOLDSTEIN: And that the medical logs of the vessel do not reflect any complaints of pain in the back.

THE COURT: Is that enough?

MR. STEARNS: Well, I want that he went to the medical officer on board the ship and at that time complained of other things, but made no mention of his back.

THE COURT: All right, put this in or let's get the stipulation. I'm going to let it in if it's certified. Is it certified?

MR. STEARNS: No, it's not. It's a question of getting an attorney to come here and say he had it in his file. I can get the original.

THE COURT: All right, get it up here and then there won't be any quibbling about stipulations.

MR. STEARNS: Your Honor, these entries are each signed by the plaintiff, and I will call him to the stand tomorrow and ask him if that's his signature and ask him whether --

THE COURT: All right, get Dougherty's paper, too, if you can.

(Adjourned to Thursday, April 10, 1975 at 10:00 a.m.)

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Leroy Porss

72 Civ. 1600

vs

Maritime Overseas Corporation

New York, New York
April 10, 1975-10:00 a.m.

(Trial resumed.)

(In the robing room, both counsel present.)

THE COURT: I want to remind counsel of two things:

One, you may, with any appropriate question, examine or cross examine each doctor as the case may be with respect to matters pertaining to maintenance and cure. I have told you that. I repeat it.

Secondly, I assume that each of you knows that the determinations in the Public Health Hospital as to not fit for duty or fit for duty aren't necessarily determinative.

Now, is your doctor here, counsel?

MR. GOLDSTEIN: Yes, he is.

THE COURT: Dr. Seaman.

MR. GOLDSTEIN: Dr. Seaman.

MR. STEARNS: Your Honor, one thing. I don't see in my file a copy of Dr. Seaman's first report.

MR. GOLDSTEIN: Didn't he just give it to you?

MR. STEARNS: Yes. He did. That's exactly the

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point.

THE COURT: When did you get it, counsel?

MR. STEARNS: This morning.

MR. GOLDSTEIN: That is not true. We gave it to Mr. Hopkins --

MR. STEARNS: I don't know. I don't see it in the file.

THE COURT: Do you have one now?

MR. STEARNS: I have it now, sure. I only got it this morning.

THE COURT: He testifies from his report. Of course that will have to be marked for identification and it may be examined by the openining party in each case.

All right, let's go.

(In the courtroom, jury present.)

THE COURT: Call your witness, counsel.

MR. GOLDSTEIN: All right, sir.

Dr. George Seaman, please.

G E O R G E J. S E A M A N, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q Dr. Seaman, you are duly licensed to practice in the State of New York, sir?

THE COURT: Practice what, counsel?

MR. GOLDSTEIN: Medicine.

A I am.

Q Doctor, do you have a specialty in your practice?

A I do.

THE COURT: When were you licensed, Doctor, first?

THE WITNESS: 1949.

THE COURT: That was in New York State?

THE WITNESS: In New York State in 1949. British Columbia prior to that.

Q Doctor, do you have a specialty within your practice?

A I do.

Q Can you tell us what that is, sir?

A Orthopedic surgery.

Q Doctor, how long have you been an orthopedic surgeon?

A Since 1942.

Q Can you tell us, Doctor, what medical school you graduated from?

A St. Louis University.

Q In what year, sir?

A 1940.

Q Can you tell us where you practiced after that, or where your internship was?

A I was a country doctor for a while and then I had an internship at the Jewish Hospital of Brooklyn in Brooklyn, of course, and then I was in the Army until late 1945 but with terminal leave that came to '46.

I had residencees after that at Jewish Hospital of Brooklyn, Metropolitan Hospital, Flower Fifth Avenue Hospital, and Knickerbocker Hospital, and then went to the Jewish Hospital in Brooklyn.

I completed my residency training in 1949 and started private practice then.

Q What was that residency training for, sir?

THE COURT: In what field was it?

Q In what field?

A Orthopedic surgery.

THE COURT: Are you a diplomate in that area?

THE WITNESS: Yes, your Honor.

Q Doctor, can you tell us what a diplomate means?

A There is an examination, of which I am one of the examiners, to determine one's competency to be a specialist.

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It is an examination both written and oral, and it is designed to test judgment, not facts, which can be -- the facts, of course, can be learned from a book -- but judgment and experience. It is given in two parts over two succeeding years, and I finished mine in 1951.

Q Doctor, is that why you are called a diplomate in orthopedic surgery?

A Yes.

Q Is that what you are at the present time?

A Yes.

Q You say, sir, that at this time you give the tests?

A I am one of the examiners.

Q And how did you rise to that position, sir?

THE COURT: What difference does it make?

MR. GOLDSTEIN: I think the jury is entitled to know.

THE COURT: How does he rise to it?

Q How did you get to the point where you give the examination rather than taking the examination?

THE COURT: Can you state an answer to that?

THE WITNESS: Yes, your Honor.

THE COURT: Do so.

A The American Board of Orthopedic Surgery selects

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certain of the members of the American Academy of Orthopedic Surgeons of which I am one to inspect the questions prior -- inspect the written questions prior to the time that they are given to the candidates who take the examination and I am one of those who inspects the --

THE COURT: Do you conduct any oral examinations?

THE WITNESS: No, I don't conduct the orals.

THE COURT: All right.

Q Now, Doctor, where do you have your office?

A 99 Lafayette Avenue, Brooklyn.

Q Doctor, have you seen Leroy Porss at any time, sir?

A Yes.

Q Doctor, did you see Leroy Porss at my request?

A Yes.

Q And that was for the purpose of evaluation and for ultimate testimony if that was to be the case, is that correct, sir?

A Yes.

THE COURT: When was it, Doctor?

Q Doctor, can you tell us the date that you first saw Leroy Porss?

A In answer to his Honor's question, I first saw him on April 14, 1972.

THE COURT: Are you now referring to your report

or some record.

THE WITNESS: I am looking at it. Yes, your Honor.

THE COURT: Counsel, get it and give it to the clerk so that it may be marked for identification. Take his copy.

MR. GOLDSTEIN: Well --

THE COURT: He will get it back, counsel. That's the procedure which is normally followed. Give it to the clerk to have it marked for identification.

MR. GOLDSTEIN: Does your Honor mind? I don't want to read it. I want to make sure that the original which I have is a copy or that this is a copy that I have.

THE COURT: Well, give him the original, if you have it, Doctor.

THE WITNESS: No, sir, I don't have it.

MR. GOLDSTEIN: I have it. I was going to give him the original.

(Plaintiff's Exhibit 8 marked for identification.)

Q Dr. Seaman, is the copy that you have before you, sir, an exact copy of the original that you had sent to my office some time back?

A Yes.

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Q Doctor, let me -- just look at it for a second.

THE COURT: Which is this that you are handing him now?

MR. GOLDSTEIN: The original that has been marked for identification.

THE COURT: That hasn't been marked for identification.

MR. GOLDSTEIN: The original has been marked for identification.

THE COURT: The other was not marked?

MR. GOLDSTEIN: The other was not. I am asking the doctor now if the one that he has is an exact copy.

THE COURT: It doesn't make any difference if he has it or not if he has the original before him.

Q Doctor, is the copy that you have an exact copy of the original that I have?

A Yes.

Q Doctor, when you saw Mr.Porss --

THE COURT: May we have the date again?

MR. GOLDSTEIN: April 14, 1972.

THE COURT: Is that right, Doctor?

THE WITNESS: Yes, your Honor.

THE COURT: Very well.

Q Doctor, when you saw Mr. Porss on April 14, 1972,

did he make complaints to you?

A He did.

Q Can you tell us what those complaints consisted of?

A The patient is walking with a cane which is self-prescribed. With respect to his back, there is a constant pain in the back made worse by sitting, prolonged standing, or bending, or lifting, or pushing or pulling which increases back pain.

There is an increase of back pain when arising in the morning. There is pain sometimes in the entire right lower extremity down to the ankle.

THE COURT: You didn't treat him, did you, Doctor?

THE WITNESS: No, sir, I didn't.

THE COURT: Consequently, of course, history is not admissible.

THE WITNESS: Shall I continue,your Honor?

THE COURT: No, no.

THE WITNESS: I'm sorry.

MR. GOLDSTEIN: Those are his complaints, Judge.

Q Doctor, continue, if you will.

THE COURT: Wait. Let's find out what the question is, first.

MR. STEARNS: The question is about complaints

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made by the --

THE COURT: Complaints. All right, finish up the complaints.

THE WITNESS: Pain in the right hip particularly with bad weather. He wears a corset with some relief of pain.

Q Did he tell you what had happened to him that caused this?

THE COURT: That of course is history, counsel. That is inadmissible.

Q Doctor --

THE COURT: That is the customary rule, counsel.

MR. GOLDSTEIN: With all due respect, sir, when you are talking to an expert he has to give an opinion based upon the history.

MR. STEARNS: Your Honor, I have no objection.

THE COURT: Sustained as to history.

MR. GOLDSTEIN: If your Honor please, the attorney for the defendant has said he has no objection.

MR. STEARNS: I have no objection.

THE COURT: All right, let him give it then.

MR. STEARNS: I would ask it myself, your Honor.

THE COURT: All right. I don't object if you don't.

Q Doctor, may we have the history that Mr. Porss gave to you?

A The history that he gave was that he was injured on June 8, 1971 about 10:15 p.m. when he was pulling a heavy hose while he was cleaning tanks on a ship. He sustained injury to his back.

He was kept at the Public Health Hospital in New Orleans for one week.

He then received physical therapy and medication at the out-patient department of the Public Health Hospital. That out-patient department is at Houston Street, New York City.

He has not worked since the injury, he told me, and he is not working at the present time.

Q And that, of course, was in April of 1972?

A That is what he said.

Q Now, Doctor, you examined him?

A Yes.

Q Can you tell us, first, the nature of your examination?

A It is --

THE COURT: What was it, Doctor? What kind of an examination was it, generally speaking?

THE WITNESS: It is an examination of a patient

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with a back complaint. It is done by an orthopedic specialist.

THE COURT: What did you do?

THE WITNESS: I gave him the numerous tests that an orthopedist does. I asked him to bend, turn and twist. He was examined standing, sitting, lying down on his back, and lying down on his face.

Q Did you take any x-rays at that time, doctor?

A Yes.

Q Doctor, did you examine him for any objective signs, objective symptoms of his condition?

A The wording of your question contains a contradiction in itself.

Q All right. Tell us what that is?

THE COURT: Isn't there a customary meaning of objective and subjective?

THE WITNESS: Yes, your Honor, there is.

THE COURT: The question is did you examine for objective symptoms.

THE WITNESS: That's the contradiction. There are no objective symptoms. Symptoms --

THE COURT: All right, then there were none. You found no objective symptoms.

THE WITNESS: No, sir. The question has built

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into it wording of something that says yes and no at the same time.

Q You mean symptoms are subjective and that the contradiction between the words objective and symptoms, is that correct?

A Yes. There can be no objective symptoms other than the patient says, "I have a lump or something like that."

Q Did you examine him for any objective findings?

A Yes.

Q My mistake, Doctor.

Can you tell us what those objective findings were, then?

A The patient walked slowly and carefully. He stands erect with some paravertebral muscle spasm. This is a tightness of the muscles in his back. Flexion of the lumbar spine or bending forward is excellent. The other motions are limited and painful.

Squatting is comfortable. The hyper extension sign which is a test in which the patient is requested to lie crosswise across a narrow table putting his back in an arched position, the reverse of bending or crouching. This sign was positive causing pain.

The knee jerks --

THE COURT: Will you explain that again.

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I didn't quite understand it.

THE WITNESS: It is a test in which the back is arched backward as in the swan diver position. It is a straightening of the back but it is more. It is the backward bending of the back. It can be tested in four separate positions: Standing, side lying, on the face or on the stomach, but this particular time it was tested with the patient on his back looking up across a table. His back is arched.

THE COURT: What did you observe?

THE WITNESS: That the test was positive. The positiveness is that there is a reaction because the back is placed in that position, the reaction consisting of the production of muscle spasm and an involuntary flexion of the hips to relieve it.

THE COURT: Where was there any muscle spasm, Doctor, in the hip?

THE WITNESS: In the hip areas.

In a patient such as this who has what I know he had later --

THE COURT: Wait a minute. There is no further question. Wait for the next question.

Q Doctor, you mentioned paravertebral spasm. Can you tell us what that is, Doctor?

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A That's a tightness of the muscles on the side of the vertebra, of the spine.

Q In what area of the spine, Doctor?

A Just to the side of the mid-line.

Q Doctor, can you show us on yourself or on me exactly the area that you are talking about?

THE COURT: That isn't very helpful. If he has x-rays he may show it.

Q The x-rays won't show the spasm, does it, Doctor?

THE COURT: Yes, but he won't have a photographer here to make a record of his demonstration, do we?

MR. GOLDSTEIN: Whether we have a photographer or not can the doctor show the jury the area of the back that he spoke about?

THE COURT: Then you will have to have counsel agree with you on what the demonstration shows.

MR. GOLDSTEIN: All right, sir.

Q Doctor, could you show on me or yourself exactly the area of the back that you are talking about?

A The mid-line of the body is the mid-line, like the center of the nose, or the bellybutton, umbilicus or the back. There is also a mid-line. It refers to the body divided, and the mid-line of the back has a little groove in it. On each side of it there are large muscles.

Those are the paravertebral muscles, and in this patient were in spasm. They could be felt to be harder than normal.

THE COURT: What do you mean by in spasm, Doctor?

THE WITNESS: Harder and firmer than normal.

Q Doctor, is a spasm of the paravertebral muscles voluntary or involuntary?

Are they subjective or objective?

A It is an objective finding.

Q Doctor, can you tell us if the objective finding is an indication of a condition independent of the patient, that is, that the patient --

THE COURT: I don't know what you mean by that, counsel.

MR. GOLDSTEIN: I think the doctor will.

Q When I say independent of the patient, Doctor, I am talking about a condition that the patient himself can't feign or bring about.

A That is correct. It is not within his voluntary control.

Q He cannot tighten that muscle as you found it to be tightened when you examined him?

A That is not exactly true. There are people who are highly trained, particularly physicians, physiotherapists,

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certain athletic people who can selectively tighten knowing the intimate details of anatomy. Students of anatomy co d -- it is possible, if you knew exactly how to do it -- for a model, and there are some for art students, who can selectively tighten any muscle. I could do it.

Q These are trained people?

A Who know anatomy.

Q All right. Did you find Mr.Porss to be of that class?

A I didn't test him for his knowledge of anatomy.

Q Okay. Now, Doctor, you also found the involuntary spasm at the hip level, you tell us?

A Yes.

Q Is this again, Doctor, an objective finding of spasm?

A Yes.

Q Now, Doctor, can you tell us what your findings were as a result of that first examination?

A Well, I have already gone up to and read through where the findings were, the knee jerks were equal, that is testing and tapping the front of the knee with a reflex hammer, the ankle jerks were equal.

THE COURT: Not so fast. Is there anything else that you observed?

THE WITNESS: Yes, your Honor.

THE COURT: Please come to that but don't go so fast. Remember that the jurors are laymen.

THE WITNESS: He can walk on his heels and toes. Straight leg raising piriformis stretch test, and Patrick signs are positive; slightly greater on the right.

Q Doctor, tell us what that means.

A These are tests performed during the examination of a back. They refer to motion of the legs and hips in which the legs are brought straight up, in the first one, with the knee straight.

The second test, the piriformis test, stretch test, is one in which the hip and knee are bent with the knee pointing toward the opposite shoulder. And the Patrick test is one in which the knee and hip are bent with the knee pointing to the shoulder on the same side.

That is withdrawal positive in the fact that they produced pain slightly greater on the right. Tenderness, which means pain on pressure, is located at the lumbosacral junction in the mid-line. This is the lower mid-line of the back, the middle part between the two halves of the body, just a little bit below the belt. It is the junction of the lumbar spine, the movable portion of the spine with the sacrum, the fixed portion of the spine.

The prone hyper extension sign is positive. In this test the patient is face down on the table and by using his hand supporting himself on the table he arches his back in the same position that he did when he bent over crosswise when he was on his back.

THE COURT: What do you mean by saying it is positive?

THE WITNESS: Yes, your Honor.

THE COURT: What do you mean by that?

THE WITNESS: A positive test in this test is the production of both pain and the appearance of a sharp muscle spasm when the point of pain is reached.

Normally, in the prone position, and in this patient, the muscle spasm relaxes and the normal person should be able to hyper extend without pain or muscle spasm. This patient, when he is hyper extended, has both pain and muscle spasm. That is a positive test.

The vertical compression test is done with the patient seated, his arms crossed, and the examiner or the doctor presses down sharply on his shoulders.

THE COURT: What is that test called?

THE WITNESS: The vertical compression test.

This test was positive and it caused low back pain with some radiation of pain.

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Q Where did that pain radiate to, Doctor?

A The report doesn't say so --

THE COURT: No. Will you listen to the question. You don't have to look at your report if you don't want to. Just read the question.

(Question read.)

A The report doesn't specifically state where the pain --.

THE COURT: Did you know?

THE WITNESS: Yes, sir, I do.

Q Do you have any independent recollection?

A Not independent recollection but from the connotation of the report and the way the report is phrased, and other references in the report, the radiation is down the right lower extremity.

Q Now, Doctor, can you tell us what your findings were as a result of all of these tests being performed?

A The findings are what I found. I have already concluded that answer.

Q Did you take any x-rays?

A Yes.

Q Can you tell us the result of the x-rays that were taken?

THE COURT: I assume that the x-rays will be

available.

THE WITNESS: They are, your Honor.

THE COURT: Do we have a box here?

THE CLERK: We have a box here; yes, Judge.

THE WITNESS: These were negative, normal.

Q That means negative for fracture, Doctor?

MR. STEARNS: Objection. He has already answered that. It means normal.

Q What were they negative for?

THE COURT: Wait a minute. There is an objection to the question. Sustained in the form.

Q What were they negative for, then?

A They were negative for anything visible on the x-ray, but that doesn't exclude any --

MR. STEARNS: Objection. Move to strike.

THE COURT: Strike out the answer.

Q Doctor, does that include, that is, would the x-rays show the areas of spasm that you found in your tests?

A No.

Q So that your testing was in addition to the x-rays? The x-rays would simply not show this type of finding?

A Could you rephrase your question?

Q All right. Doctor, would the x-rays establish

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or show muscle spasm in the various areas that you indicated?

A No.

Q Now Doctor --

THE COURT: And I take it they didn't show muscle spasm, is that correct?

THE WITNESS: They can't show muscle spasm.

THE COURT: All right. Very well. So long as we laymen understand it, Doctor.

Q Now, Doctor, can you tell us the results that you found in the condition of Mr. Porss?

THE COURT: What do you mean by results? Diagnosis or what?

MR. GOLDSTEIN: Yes. Diagnosis.

THE COURT: Rephrase your question, counsel.

Q Doctor, will you please tell us the diagnosis of Mr. Porss as a result of the tests that you gave him on April 14, 1972?

THE COURT: As of that date?

A My diagnosis was that the patient had a chronic unstable low back --

THE COURT: What, sir?

THE WITNESS: Chronic unstable low back.

Q In what way, Doctor? Will you please tell us?

A This is a condition extremely common as a result

of bending or lifting or hyper flexion, particularly with force. It is the condition which causes recurrent or chronic or prolonged symptoms referable to a back worse with exertion, relieved by rest, particularly rest in flexion.

Q And Doctor, did you perform any electric testing?

A Yes.

THE COURT: Electric testing?

MR. GOLDSTEIN: Yes.

A Yes.

Q Doctor, can you explain the equipment that you used to perform that test?

A Well, only incompletely. It is beyond my knowledge exactly. It is an electromyographic machine and I really don't know the inside workings of it. It is a highly technical thing which use a screen called a cathode ray oscilloscope which looks like a television screen, and lines appear on it in varying shapes which of course these I am trained and can interpret but the inside workings I don't know.

Q Doctor --

THE COURT: Please don't interrupt him. Wait until he finishes his answer.

Q Doctor, what is the purpose of the test?

A The test that was done on this patient has, as

its purpose, the diagnosis of a herniated disk.

Q Doctor, was the test in fact performed by you?

A Yes.

Q And did you make findings or did you have results from that test?

THE COURT: Just one question at a time.

Q Did you have results from that test, Doctor?

A Yes.

Q Can you tell us what that result was?

A Details or conclusion.

Q Details and conclusion, Doctor.

A The latency time --

THE COURT: What is it, sir?

THE WITNESS: Latency time. All right let's go. The results in the patient were as follows: The latency times, which is the time that the impulse is placed in, the small shock applied to the nerve, until it appears on the cathode ray oscilloscope was 28 milliseconds or thousandths of a second equal on both sides.

The maximum amplitude of the wave form on the cathode ray oscilloscope was 600 microvolts or 600 millionths of a volt on the right.

THE COURT: Will you please explain what those terms mean, Doctor?

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THE WITNESS: I'm not sure that I really know exactly what a volt is but I think it is some electrical term with respect to power.

THE COURT: Well, if you don't or can't explain it of course --

THE WITNESS: And when an impulse is placed into a nerve, the nerve transmits the impulse in accordance with its nerve characteristics which are somewhat related to the way an electric wire transmits them.

In an electric wire you get not quite but almost 100 per cent return, copper being the best conductor.

A nerve conducts electricity. There is an electrical impulse placed into the patient through his skin, it can be done by needles of course, through his skin an electrical impulse is placed into the back of his knee into a nerve which was located there, and the nerve impulse goes around about through his skin and out and comes out again in the calf where we have a receiver on the calf muscle and that is tapped into this television apparatus.

The nerve impulse that we place in is of a certain amount, and the nerve impulse that we get out on the receiver, on the television screen, is dependent upon the conduction impulse of the nerve. It is a way of testing whether that nerve is conducting.

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Q Doctor, what was the result of that test?

THE COURT: Can you add anything you haven't said?

THE WITNESS: The end result was that the thing was basically normal and the patient doesn't have a herniated disk.

THE COURT: Basically normal and no herniated disk, correct?

THE WITNESS: Yes.

THE COURT: All right. That is the answer.

THE WITNESS: Well, the amplitude --

THE COURT: Do you want to add to it?

THE WITNESS: Yes, your Honor.

A The amplitude on the left is low. The test as a whole must be considered within the normal range indicating that he doesn't have a herniated disk.

Q Doctor, did you again see Mr. Porss?

A Yes.

Q Can you tell us the date that you saw him the second time?

A January 27, 1975.

Q And did you again examine him?

A Yes.

Q Did he again tell you what his complaints were?

A He did.

Q Can you tell us what the complaints were that he told you about?

A He still has considerable low back symptoms.

THE COURT: He said that.

THE WITNESS: That is what he told us.

Q Did you examine him then?

A I did.

Q Did you then also take x-rays in the course of your examination?

A I did.

Q Now Doctor, will you again tell us your findings at this second examination on January 27, 1975?

A The findings on physical examination of January 27, 1975 were as follows:

There was a positive hyper extension sign, there was pain on resisted extension, there was a positive straight leg raising sign, piriformsis stretch test and Patrick sign, a positive vertical compression test, and mid-line lumbosacral tenderness.

Q Doctor, is this basically the same areas of pain and symtomology that you found on the first test?

A Yes.

Q Now, Doctor, you took x-rays of Mr. Porss in January and of course in April 1972, is that correct, sir?

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A I took them in January 1975 and in April '72, yes.

Q Do you have those x-rays with you?

A Yes.

Q May we see them, Doctor?

A Yes.

MR. STEARNS: Your Honor, in view of the testimony so far that these x-rays were normal, is there any point in --

THE COURT: Were they normal, Doctor?

THE WITNESS: The ones in 1972 were. The ones in 1975 weren't.

Q Can we now see the ones in 1975, then, Doctor?

THE COURT: Let them be marked for identification, counsel.

MR. GOLDSTEIN: Yes, of course.

Doctor, may we mark them first, please?

Q There are two so, far, Doctor. Are there any more in January?

A That's all for January.

(Plaintiff's Exhibit 9 marked for identification.)

(Plaintiff's Exhibit 10 marked for identification.)

Q Doctor, I refer first to Plaintiff's Exhibit 9.

THE COURT: Do you want the box?

MR. GOLDSTEIN: Yes. Do we have a shadow box?

THE CLERK: Yes.

THE COURT: This is Exhibit 9 you are questioning about, counsel?

MR. GOLDSTEIN: Yes, sir.

THE COURT: Is it 9?

MR. GOLDSTEIN: Yes, this is Exhibit No. 9.

THE COURT: All right. Put it up there if you will, Doctor.

Now, what is the question? What is the question to the doctor?

Q Can you tell us the results of that x-ray?

MR. STEARNS: What x-ray is this?

Is there a date on it.

THE COURT: Exhibit 9. The result or what it shows.

MR. GOLDSTEIN: What it shows.

A This is an x-ray of this patient, Mr. Porss, side lying with his hips and knees bent fully.

It shows the patient as he stands there. You cannot make a decision on this x-ray without comparing it with the other.

Q Which other? You mean --

A The companion film.

All right.

THE COURT: This is which side of the body or hip?

THE WITNESS: Well, this goes through from side to side and the x-ray would be identical whether it was taken lying on his right or left. That can't be told from the film nor is it important.

THE COURT: Is there anything abnormal about that which is shown here?

THE WITNESS: No.

THE COURT: All right.

Q Doctor, was this film taken in January of 1975 of Mr. Porss?

A Yes.

Q Now, Doctor, I refer you to Plaintiff's Exhibit No. 10.

THE COURT: Now wait a minute, counsel. I'm going to do this, which I customarily do. I am going to allow cross examination, if any, by your adversary after each film and while it is shown and then we will go to 10.

Any questions about 9, counsel?

MR. STEARNS: This is a January x-ray, is that right?

THE WITNESS: Yes.

MR. STEARNS: And your testimony is --

THE COURT: January '75?

THE WITNESS: Yes, your Honor.

MR. STEARNS: And your testimony is that this is an x-ray of Mr. Porss' hips and knees fully flexed.

THE WITNESS: Bent, yes.

MR. STEARNS: And it is a view from side to side, is that correct?

THE WITNESS: Yes.

MR. STEARNS: You call that a lateral view, do you not?

THE WITNESS: Yes.

MR. STEARNS: And you say that that is normal.

THE WITNESS: This film is within normal limits, yes.

MR. STEARNS: Nothing else.

BY MR. GOLDSTEIN:

Q Now, Doctor, I refer you to Plaintiff's Exhibit 10 and ask you, Doctor, what that film shows?

A This is a film of the same patient at the same day, maybe five minutes later or earlier, in which his back is bent backwards completely on the table, side lying.

Q Can you tell us the results of that film?

A This film, in itself, without comparing it with the other film, is within normal limits.

Q Did you compare the two films?

A Yes.

Q And can you tell us the results of the comparison of the two films?

A Yes. They have to be superimposed for proper comparisons.

Q Please do so, Doctor, if you will.

THE COURT: Is that the right one?

THE WITNESS: Forward is forward, down is down, up is up, and backward is backward and the two forms it be superimposed and they are light enough so that it would be possible if you were close to see the superimposition. If you have a stapler or paperclip I can perhaps fix them in the position of their --

THE COURT: He will give you a stapler if you want it.

THE WITNESS: A stapler will be better because a paperclip will slide them.

THE COURT: Let the record show that the doctor is stapling Exhibits 9 and 10 together.

THE COURT: Let the record show that the scotchtape is being supplied to hold up the two combined exhibits.

Q Doctor, can you now explain the comparison of the two films and what both films show together?

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A Well, with the superimposed films you would need especially strong lights to see them.

THE COURT: Are they visible now in this position with this light?

THE WITNESS: To my eyes, yes, because first I know what is there, and second I am close enough to see them but from any distance it would be impossible to see the abnormalities on this film.

MR. GOLDSTEIN: May I impose upon the Court to move the light on the Court's desk closer to the film?

THE COURT: The light on the desk?

MR. GOLDSTEIN: Yes, on your desk.

THE COURT: You mean this light?

MR.GOLDSTEIN: Yes, sir. Can we conceivably move it closer?

THE COURT: All right, I will allow it.

THE WITNESS: No. You would need the light from the back. That is what has to be the strong one.

THE COURT: From the back of the x-rays.

THE WITNESS: Yes.

THE COURT: This doesn't help, does it?

THE WITNESS: It might. That light has a stronger wattage than this one.

THE COURT: Where can you put this where it will

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show from the back?

THE WITNESS: I can put it right in front of the film.

THE COURT: You can try it and then let the record show what has been done.

MR. GOLDSTEIN: Can I help you in any way, Doctor?

THE WITNESS: If he wants help he will ask for it.

MR. GOLDSTEIN: I only offered it, Judge.

THE COURT: Yes, and I don't think it is necessary.

THE WITNESS: If this irritates anybody's eyes let me know.

THE COURT: Now, you are holding these exhibits 9 and 10 coupled together by the stapler in front of a desk lamp, is that right?

THE WITNESS: Yes, your Honor.

THE COURT: What do you see now, if anything?

THE WITNESS: I can't see it because I am behind it but I know the readings because I have looked at them through the lights.

MR. GOLDSTEIN: Can we ask the doctor to step around so he will be in front of your light?

THE COURT: Yes, if he can step up that high, I don't know.

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A Now, through the bright lights I can see it from here.

THE COURT: The light is being turned end to end.

THE WITNESS: -- it is possible to see those vertebral bodies, the square looking bodies of white areas of bone, and one of them, the L-4, has been superimposed upon the other and fixed that way by the staple.

Now, --

THE COURT: What do you mean by L-4 being superimposed?

THE WITNESS: There are five lumbar vertebrae. The body of the verbra is a massive piece of bone which, in this x-ray, looks like a rectangle.

There are five of them numbered serially from above, down. The lowest one is the fifth. The one above the lowest is the L-4 vertebra, and in this x-ray I have superimposed the film so that L-4, the rectanglular bone, is superimposed one above the other.

Now, then, the film shows that there was limited motion between L-4 and L-6 but normal motion between L-5 and the sacrum, the level below the sacrum; good motion at the hips.

THE COURT: Will you repeat that for us?

THE WITNESS: Yes, your Honor. There was

limited motion between L-4 and L-5, normal motion between L-5 and S-1, good motion at the hips, and good motion between L-3 and L-4.

In other words, the lumbar spine, the body, the lower portion of the spine, should move as a chain, forward, backward, sidewards, to each way.

And these films, one taken in forward bending and one taken in backward bending, and then superimposed at one level, show that at the level just below where the films have been superimposed and stapled and fixed, that level doesn't move, but the other levels do.

This indicates the site of his problem, the location of this patient's problem being at L-4-L-5.

THE COURT: Will you explain, before we go on, from where 9 was taken, how Exhibit 9 was taken and how Exhibit 10 was taken, since you referred to them?

MR. GOLDSTEIN: The views?

THE COURT: All right. I think he understands. If he doesn't he can ask.

THE WITNESS: No, sir. You didn't finish your question before the interruption. I'm sorry. I didn't follow you.

THE COURT: I would like to have you explain the method of taking, the direction that it was taken

in and so forth. My terminology might not be so good, on 9 and 10.

THE COURT: Yes. These two films were taken with the patient lying on his side on the x-ray table with the beam projected through his body from one side to the other. The first view or one of the views was taken with his body coiled up in maximum flexion with his knees up to his neck or chin.

THE COURT: Was that 9 or 10?

THE WITNESS: I would have to look at the film to see.

THE COURT: Please do.

THE WITNESS: That is 9.

And No. 10 was taken with the patient on the table, on his side, the beam going through his body from side to side, with his back arched backward with the heels coming up to the back of his head, if possible. Of course it is not possible.

Q Doctor, the results of these films and the results of the tests that you performed in January of 1975 caused you to draw some conclusions. Can you tell us what those conclusions were concerning the condition of Mr. Porss on that day?

A Yes.

THE COURT: On which date now?

MR. GOLDSTEIN: That is January 27, 1975.

A The conclusion was that the patient has a permanent condition and that he is unable to do heavy labor requiring sustained exertion.

Q Now, Doctor, are you aware of the type of work that Leroy Porss did?

A More or less.

THE COURT: If you are going to ask him any hypothetical question you will have to do it.

MR. GOLDSTEIN: I will, sir, in due course.

Q Did he tell you that he was a seaman?

A Yes.

Q Are you aware of the nature of the duties of seamen?

A In a very general way.

Q Did he tell you that his job requires him to bend and to lift and to pull and to move about in physical labor?

A I didn't inquire.

Q Well, Doctor, assuming that the job that Leroy Porss does as a seaman does in fact require these types of exertions.

THE COURT: What do you mean by these types,

counsel?

Q That is, that he lifts objects, he pulls objects, he is required to bend in the performance of his duties, and that the testimony is that he helped to lift a hose and a machine weighing approximately 300 to 500 pounds this time with the aid of two other men.

THE COURT: I want to say here for the benefit of the jury and counsel, any expert who testifies and his testimony is based upon other facts, his testimony is as good as the credibility and the truth of the facts on which it is based. Please remember that.

Q Now, I ask you to assume, further, that there are lesser weights that he would be required to pick up from time to time weighing approximately 100 pounds, and Doctor, I ask you if you have a fair degree, with a reasonable degree of medical certainty as to whether you have an opinion as to the accident causing --

THE COURT: Wait. You have got to state what the assumption is. You just can't say the accident.

MR. STEARNS: I object to it as to form.

MR. GOLDSTEIN: I was going to use it later. All right. Strike that, if you will.

Q Doctor, assume first that Mr. Porss, who is a seaman, is required to lift heavy weights, that he is

required to bend, that he is required to --

THE COURT: You are not defining it any more than heavy weights.

Q Heavy weights, at times up to three to 500 pounds, with the aid of other people, and at times lesser weights with the aid of other people or by himself at times, would you consider, if you will, the fact that on June 8, 1971, Mr. Porss was performing duties that did in fact require him to lift a heavy weight, that in the course of that performance of his duties he was forced forward and pulled down to his knees by the heavy weight that was suddenly shifted from the hands of other people to his hands.

Further assume, Doctor, that he was then relieved from duty, that he stayed off duty for three days, that he was then transferred or taken to the Marine Hospital in New Orleans, that he remained in the New Orleans Hospital for six days, and was then declared not fit for duty but fit to travel, and that he then returned to New York and was seen in out-patient at the Houston Street Clinic of the Public Health Service in New York City.

Now, Doctor, assume further that he was examined by you in April of 1972 and again in January 1975.

Doctor, now, do you have an opinion with a fair degree of medical certainty as to whether the condition

as found by you on April 14, 1972 was causively related to the accident that I have described to you that occurred in June, on June 8, 1971?

MR. STEARNS: Objection.

THE COURT: Well, what is the objection, incorrect statements or something left out or what?

MR. STEARNS: Well, yes. There are things left out and there are statements that are incorrect. The principal statement that is incorrect --

THE COURT: You may cross examine and ask him if his opinion would be the same if it were changed so and so as you contend. All right. Can you answer the question now? Do you understand the question?

THE WITNESS: Yes, sir, I understand the question and I can answer it.

THE COURT: What is your opinion then?

THE WITNESS: That the accident was a competent producing cause of his current condition and his symptoms.

Q Doctor, when you examined him in January 1975 and you made your findings as a result of those tests and of the x-rays as you have indicated in testimony today, Doctor, do you have an opinion with a reasonable degree of medical certainty as to whether the condition that you found in January 1975 was related to the accident of June

8, 1971.

THE COURT: Read that question. I don't understand it. I thought you asked all of this before and now you are asking it again.

MR. GOLDSTEIN: I asked it as of April 14, 1972 and now I am asking it as of January 27, 1970.

THE COURT: Read the question.

(Question read.)

A Yes, I can answer it.

Q Please do, sir?

A The condition I found in January 1975 and the past and the future is related to the accident of June 8, 1971, caused by, I'm sorry --

THE COURT: You put in something about the future which wasn't asked for in the question. Strike that out for the time being.

THE WITNESS: Oh, I'm sorry.

Q Doctor, will that condition continue in the future?

A Yes.

THE COURT: Let me ask a question which I think is certainly appropriate here.

Can you state that you are reasonably certain that this condition will continue?

THE WITNESS: Yes, I can.

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THE COURT: In the future?

THE WITNESS: Yes, I can state. It is.

THE COURT: With reasonable certainty?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

BY MR. GOLDSTEIN:

Q What is the basis of that statement, Doctor?

A The patient has had continuing symptoms and complaints since 1971. He has had positive physical findings on two examinations, he has positive x-ray findings, and this is of the type if it gets better it gets better only so slowly as to be almost insignificant. It will improve if he avoids exertion for a long, long time, but his vulnerability to any sustained exertion is permanent.

Q Would a corset worn in the area of the lumbosacral part of the back give him any help?

A Yes, it would, definitely.

Q Now, Doctor, is this the type of condition that has periods of exacerbation, that is, gets worse, or remission, getting better?

A Yes.

THE COURT: Did you ever advise him on the first occasion you saw him to have a corset?

THE WITNESS: I don't believe so.

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THE COURT: Did you on the recent occasion?

THE WITNESS: No, I didn't.

THE COURT: All right.

Q Doctor, did you know that Mr. Porss was advised and was given a corset by the Public Health Service?

A I was not aware until you just told me.

Q Now, Doctor --

A Yes, I'm sorry. I was. I have a note on my chart that he wears a corset with some relief of pain.

Q Now, Doctor, can you tell us what you mean by the terms exacerbation and remission as it relates to Mr. Porss' condition?

A Exacerbation is the medical word, although it is used in other than medicine, to mean getting worse. Remission means getting better, and this condition as applied to Mr. Porss, or many, many other people with this condition is that it gets worse with exertion, strain, standing on your feet all day long, prolonged rest, such as going to the movies, prolonged sitting, after a night's sleep you get up and there is a lot of stiffness in patients with this condition. It is certainly much worse with any exertion or with any slight slip or fall. It is better with rest and flexion --

THE COURT: I think you have answered the

question.

THE WITNESS: Yes, your Honor.

Q Is it conceivable, Doctor, that on any particular day Mr. Porss may not have any pain in his back?

A Yes.

Q And is it equally possible that on any particular day he will have pains in his back?

A Yes.

Q And is that the nature of this condition?

A Yes.

THE COURT: He just said it was both getting worse and getting better. Didn't you?

THE WITNESS: Yes, sir.

Q Doctor, is this condition of pain and all of your findings of spasm and of the condition as shown in the x-rays caused or contributed to by a condition known as prostatitis?

A No, prostatitis has no relation to this.

Q Car you tell the Court and Jury what a prostatitis is?

A Inflammation of the prostate, not necessarily a sex gland although related to it. It is down at the base of the body just in front of the rectum and anus. It enlarges in older men and cause problems at night.

It can get infected in younger men. A chronic infection is an annoying sort of thing, but the incidents of chronic infection in it has been overrated. It is hard to prove.

THE COURT: Is there any incident which affects the back?

THE WITNESS: It causes an annoying sensation in the groin and the very low portion of the back, the sacrum but not the lumbosacral area. The symptoms that it causes are not the same as he has. They are unchanged b exertion. They tend to be morepermanent and steady without the variation except that they are generally worse at night when he sleeps and would be severe when he sleeps but it is a different condition than what he has.

Q Doctor, did you know that Mr. Porss at one time did suffer from prostatitis?

A You told me so this morning.

Q Did you say that in the hospital records that I showed you?

A I didn't really see it. You looked for it but it is difficult to find and truthfully I didn't see it but took your word for it that is in there.

Q Fine. Now, Doctor, is it your testimony that this condition that you found upon your examinations in April of '72 and January of '75, and as shown in the

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hospital records following, that is the hospital records of the Public Health Service Hospitals in New Orleans and in New York, are different than any condition of prostatitis would show.

MR. STEARNS: Objection.

THE COURT: Sustained in that form.

Q Doctor, what is your opinion, or do you have an opinion?

THE COURT: Hasn't he already testified about it? It seems to me it has been suggested.

Q Doctor, did you read the hospital records in New Orleans and in Houston Street in New York following the date of June 8, 1971?

A I glanced through them.

Q And did you see any notation of prostatitis in those records, if you recall, sir?

A I didn't.

MR. GOLDSTEIN: Thank you, Doctor.

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THE COURT: All right, cross-examination. Perhaps we might have a short recess first.

(Recess)

CROSS-EXAMINATION

BY MR.STEARNS:

Q Doctor, you occasionally, from time to time, examine people at the request of attorneys, is that so?

A Yes.

Q As a matter of fact, you from time to time examine people at the request of this particular firm of attorneys?

A Once in a while.

Q And from time to time at the personal request of Mr. Goldstein, the complainant, is that right, at his request; isn't that right?

A I can't recall a prior situation with Mr. Goldstein. It could be, but I don't recall any. At most maybe one over a period of 25 years.

Q With Mr. Goldstein?

A Yes.

Q How about the various other firms of plaintiffs' attorneys?

A I examine at the request of attorneys. I see, oh, a fair number of patients, maybe one a day,

maybe two a week. I have office hours three days a week.

Q At the request of attorneys, right?

A Yes, between two and three a week.

THE COURT: At the request of plaintiffs' attorneys?

THE WITNESS: Yes.

Q And this is in anticipation of your eventual coming to court to testify, if necessary, is that correct?

A If necessary. Actually the court appearances run maybe one per cent, two per cent.

Q Now, when were you contacted by Mr. Goldstein, or anybody in his office, concerning Mr. Leroy Porss?

THE COURT: The first time, you mean?

MR. STEARNS: Yes, sir.

A I would say prior to April 14, '72, when an appointment was made.

Q Now, that appointment, of course, was made by Mr. Goldstein or somebody in his office, correct?

A I assume so.

Q And Mr. Porss did come over on April 14 and he was examined by you, is that right?

A Yes.

Q Now, did you have any correspondence, or any

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records, or papers that were sent along to you for your review in connection with this examination?

A Yes, a memo letter on the stationery of Fuchsberg & Fuchsberg.

Q May I see it, please?

A Yes (handing).

MR. STEARNS: Will you mark this for identification, please.

(Defendant's Exhibit H was marked for identification)

Q I ask you to refer to this, Doctor. It appears that Mr. Porss had duty status slips with him.

THE COURT: You mean a master's certificate?

MR. STEARNS: No, a duty status slip.

THE COURT: A duty status slip. All right.

A Yes, he had something of that nature. The note says he did.

Q But he didn't bring with him any medical records?

A Well, the note says he had medical notes and duty status slips.

Q What medical notes came with him, do you know?

A I don't know.

Q At the time of your examination, you had

nothing but Mr. Porss and his duty status slips to consider, is that right?

A I can't tell you that. The transmission note written by Mr. Goldstein on the stationery of Fuchsberg & Fuchsberg says he has "med" -- meaning medical notes -- and duty status slips. I didn't make notes of which notes or slips I looked at.

Q So now is it your testimony that you can't say what records you had with you for your review at the time of this examination in April of 1972?

A That's correct. I don't know, or recall, or have notes on what other notes he had other than this one.

Q When were you first shown, for example, the records from the New Orleans Public Health Service Hospital?

A As far as I can recall, the first time I saw them was this morning.

Q This morning about 10, 10:15, is that right?

A Something like that. Yes. A little bit before 10.

Q And you had never, from April to today, seen these records?

A That's correct.

Q Had you seen the records from the Public Health Service outpatient clinic at Houston Street at any time before today?

A Again with the proviso that I don't know exactly what notes I saw in April of '72, the first time I saw those notes was this morning.

Q You make no notation in your original report that you did review any records, is that right?

A That's correct. I didn't; and do not know what notes I had available in April of '72.

Q You also don't have any independent recollection of what these medical notes might be, is that correct?

A That's correct.

Q You have nothing in your file now that would indicate whether or not there were any hospital records present at the time of your examination, is that so?

A I have no memory --

Q Isn't the likelihood that the records weren't in your possession?

A Either way. It doesn't make any difference.

Q Not necessary?

A Neither one.

Q Is it necessary to inquire into a man's

past history, a history of the condition of his back?

A Yes.

Q Did you do that?

A We asked him if he had any prior injuries.

Q Now, sir, do you have any independent recollection of a conversation you had with Mr. Porss on April 14, 1972?

A No independent recollection.

Q As a matter of fact, when you testified you virtually read word for word your report, isn't that so?

A Yes.

Q Now, everything you know about the conversation, about the details of the examination, because of passage of time, is contained in this report, isn't that right, the report of April the 24th, 1972?

THE COURT: Referring to exhibit so and so for identification?

A Yes, with the only slight amplification that all of us, including me, including I, I'm sorry, have developed habits and patterns of work so that if you ask me questions of how I did things which are not contained in the record I could answer with certainty.

Q What you are saying is that you have a routine and that your inquiry into prior history is part

of your routine and from that you assume you did so even though that's not in your report?

A Oh, that is in. I did inquire. It says specifically previous injuries in the middle of the first page.

Q Previous injuries. Now there is no reference there to any prior injury, prior history of complaint of pain having to do with his back, is that right?

A That's correct.

Q There is a reference to scars, is that right?

A Yes.

Q That's all?

A Yes.

Q So does that mean that you asked him about prior history of back injury and that he didn't tell you?

A We asked him where there --

THE COURT: Well, you did it. It wasn't two, was it? State what you did, not what "we" did.

THE WITNESS: Well, it's really a "we," your Honor, but he was asked: Were there any previous injuries? And he answered Yes, he had a shell fragment wound 30 years ago and --

Q Dr. Seaman, if I could interrupt to make this a little bit briefer, did he tell you about any prior

injury to his back?

A No.

Q Did he tell you about any prior complaints concerning his back?

A No.

Q Did you ask him about prior complaints concerning his back?

A I asked him about a prior back injury. I don't believe we asked him if he had ever had backache.

Q Doctor, isn't it impo ant to know in anticipation of your testimony the history of the man's complaints of pain in his back?

A Yes.

Q And you think you didn't ask him about prior history of complaints of pain in his back?

A He was not asked specifically whether he had any backache prior to this injury. I will agree to that, yes.

Q And you didn't think it was important to ask him that?

A It is not important.

Q Okay. Now, you asked him, did you not, how he claimed that he had been injured, is that so?

A Yes.

Q And he told you that on June 8, 1971 at about 10:15 p.m., he was pulling on a heavy hose while cleaning the tanks of a ship.

Now, is that a complete history or is that a complete recitation of what Mr. Porss told you about what had happened on June 8, 1971?

A Oh, I'm sure that there were many more words that passed other than that brief statement, but this capsulized it sufficiently to my needs.

Q Isn't it important, Doctor, isn't it possibly medically significant, the manner in which an accident is said to have occurred?

A Not really. In a general way, yes, but the specific details of an accident aren't the concern of the physician.

Q Well, do you have any independent recollection of what you asked him and what he told you?

A I have no independent recollection.

Q Did he in fact tell you that he was hurt while pulling a hose when the hose was let go, allegedly, and that he was pulled forward?

MR. GOLDSTEIN: Objection, if your Honor please.

THE COURT: Read the question.

(Question read)

MR. GOLDSTEIN: The doctor has no independent recollection.

THE COURT: Well, that doesn't mean he can't answer. He can answer the question. Maybe it's independent and maybe it isn't.

Answer the question.

A The only thing I know is what's contained in my record.

Q Now, Doctor, the general tenor of your testimony, if I understand it correctly, is that this man has a condition and that the condition will give him pain, particularly if he works at vigorous or rigorous labor. This would be the cause of flareup, isn't that so?

A Not exactly. He can work, but he cannot work at a task which requires heavy or sustained exertion.

Q All right.

Now, do you know whether or not, on June 8, 1971, Mr. Porss was engaged for a period of time between 6 and 10:15, or 9:20, or 9:30, in heavy physical labor?

A I would assume that pulling a heavy hose is what's classified as "heavy labor."

Q And do youknow, sir, that while doing this

heavy labor he developed pain in his back?

A That's what he told me. I have no independent knowledge other than his statement.

Q Isn't that consistent with the condition that you say exists?

A Yes.

Q Isn't that consistent with the reasonable belief that the condition that you say now exists and was caused by the accident was in fact present on June 8, 1971?

A I don't follow your question.

THE COURT: Read the question.

(Question read)

MR. GOLDSTEIN: Objection, if your Honor please.

THE COURT: Overruled.

MR. GOLDSTEIN: I don't understand the question, if your Honor please.

THE COURT: I can't help that. It's been read. Do you want it read?

MR. GOLDSTEIN: Judge, I would like to know whether or not the last part of that question refers to existence before the accident or after the accident?

MR. STEARNS: Clearly, sir.

MR. GOLDSTEIN: On June 8, 1971?

MR. STEARNS: Clearly.

THE COURT: He said "clearly." Do you understand the question or do you want it read again?

THE WITNESS: No, sir, I understand the question. I heard it.

A He didn't have the condition prior to the injury, and after the injury and because of the injury he does have the condition.

Q Doctor, your testimony is that this condition would, if the man worked, did strenuous physical labor, cause pain, it would give rise to pain, is that right?

A Yes.

Q Now, the question is, this condition -- how long essentially -- you understand that, don't you?

MR. GOLDSTEIN: Judge, I don't understand.

THE COURT: Your question is not clear.

MR. STEARNS: I will withdraw it.

Q Is it important to know, sir, the circumstances in which the complaint of pain was made at the time of the alleged accident?

A Not really. Up to a limit, yes, but the duration of the injury to the onset of pain is not that important.

Q What significance would the fact that the pain was said to have come on gradually have?

A Patients --

MR. GOLDSTEIN: Objection, if your Honor please.

THE COURT: Overruled.

MR. GOLDSTEIN: I don't see any testimony that the pain was said to have come on gradually.

THE COURT: This is cross-examination, counsel.

MR. STEARNS: If I may take a moment, your Honor.

I apologize for not having this handy.

(Pause)

MR. STEARNS: What I am referring to is the report marked in evidence.

THE COURT: Rephrase your question then.

MR. STEARNS: I have it here.

Mr. Goldstein, do you have handy a copy of the ship report signed by Mr. Porss?

MR. GOLDSTEIN: Well, I have it in those answers to interrogatories, if that will help.

THE COURT: Take the one that's marked in evidence, if you can find it.

MR. STEARNS: I am trying to save time.

THE COURT: All right, if there is no objection.

MR. STEARNS: I'll find it.

Q I ask you to assume, sir, that Mr. Porss said, shortly after, or the next day, that "At the moment of the accident I didn't think much of it, but the next morning I could not get up any more. At present I can walk around but can't stand or sit up too long."

MR. GOLDSTEIN: May we have the date of that so that the doctor will know?

MR. STEARNS: The date of that is -- the report is signed 6/11/1971. That's its date.

THE COURT: June 11?

MR. STEARNS: June 11.

Q Is that gradual onset of pain following --

THE COURT: Speak up, counsel, please.

MR. STEARNS: I'm sorry.

Q Is that gradual onset of pain following the period of nearly five hours of heavy physical work consistent with an explanation of back pain in terms of a condition present before June 8, 1971?

MR. GOLDSTEIN: Objection, if your Honor please.

THE COURT: Overruled.

MR. GOLDSTEIN: The word "gradual" doesn't appear. This is Mr. Stearns' own interpretation of what he is reading. He's not a doctor.

THE COURT: Of course he isn't a doctor. Neither are you, counsel.

MR. GOLDSTEIN: Well, will Mr. Stearns please ask the doctor if that is an indication --

MR. STEARNS: It is not in the report. I will ask the doctor this question.

THE COURT: All right, question withdrawn. Start over again then.

Q I am asking you, Doctor, to consider this statement and answer my question, which is: Do you interpret this as being a gradual onset of pain, "At the moment when the accident happened I didn't think much of it, but the next morning I could not get up any more. At present I can walk aroung, but can't stand or sit up too long."

A Now what is the question?

Q Do you interpret that as a doctor, reading that statement, which is Mr. Porss' statement, do you consider that statement tantamount or equivalent to gradual onset of pain?

A Gee, I would have to get a professor of semantics to determine the use of the word "gradual." I don't use it and I don't recognize it in that connotation. It is not an exact wording of whether this is or isn't gradual.

What you are telling me, if I may --

THE COURT: Don't tell him. You answer questions.

THE WITNESS: Go ahead.

A I don't use the word "gradual" in exactly that connotation so I will defer on the use of the word to a professor of semantics.

THE COURT: Well, you are asked to compare this with a situation which apparently the plaintiff referred to in this statement. This is basically and mostly medical. It isn't semantics. All right.

A The history that the patient gave of a lifting episode with a pain-free interval is characteristic of almost all lifting back injuries with a pain-free interval that varies from a few hours to one or two, up to about three days with decreasing incidents after that.

Invariably the patients have a short, almost infinitesimal episode of sharp pain, the pain subsides, they go to bed that night and the following morning their

trouble starts.

Q This is if there is a lifting episode injury, is that right?

A Well, this occurs in lifting episodes which are very common, but it also occurs in a slightly different way with a pulling episode or with a forced bending episode, although the forced bending episodes more frequently occur in automobile collisions and there the pain-free interval is a little bit less, if any.

Q Sir, were you told that this was a lifting episode?

A I have it as a pulling episode.

Q You have it now as a pulling episode?

A In my report I have it as a pulling episode. And there is very little difference between a pulling and a lifting as far as we are concerned medically.

Q Okay. To be absolutely precise you say he gave the history that he was injured on June 8, 1971 about 10:15 p.m. when he was pulling a heavy hose while cleaning a tank. He was pulling, is that right?

A That's what the report says.

Q Now, were you told and do you now understand that the pulling that was being done was the pulling of a butterworth machine out of a tank?

A I don't know anything about a butterworth machine out of a tank. I accept the history that the patient gives me just as it stands, no more, no less.

Q Pulling the hose?

A That's what my report says, pulling a heavy hose.

Q And that is consistent with pulling a heavy hose to pulling a machine, is that correct?

MR. GOLDSTEIN: Objection.

THE COURT: Sustained.

Q I ask you to assume that this pulling was on a hose which was connected to a machine and that he was pulling the hose out of a tank. Now, that's a lifting situation, is it not?

A To the doctors, or to me, a pulling and a lifting are the same exact thing. I recognize they may be far different legally, but medically they put the same strain on a back at the lumbosacral area.

Q That's exactly what I am saying. He is reaching down bending and pulling, is that correct?

A Yes.

Q And that's the situation that we are talking about, is that right?

A Exactly.

Q Now, it is not that, sir. That is not the accident, do you understand that?

MR. GOLDSTEIN: No, I don't understand what that question means.

THE COURT: Sustained. I don't know what it means.

MR. STEARNS: All right.

Q Were you told at any time before today that Mr. Porss now claims that he was pulling a hose and that he was pulled forward when allegedly two other seamen let go of the line and the hose; were you told that at any time before today?

A I think Mr. Goldstein did mention that there was something about other work.

THE COURT: Did the plaintiff tell you that?

THE WITNESS: No, I have no knowledge from Mr. Porss on that.

Q Sure gave you no history of being pulled forward, is that right?

A My chart and report do not say so, but if I recall, during the direct testimony that was mentioned.

Q But that was the first time you got that news, is that so?

A Well, it didn't make any difference to me.

THE COURT: Just answer his question. Don't argue with him.

THE WITNESS: I agree with you, your Honor.

A As far as I was aware, this was the first variation in the history of the injury.

Q Now, Doctor, I askyou to assume that a man is pulling on a hose and suddenly force is exerted along the line and he is pulled forward, what would happen to the back?

A Well, if I could have another paperclip I will show you exactly, a large one preferably, but a small one will do.

THE COURT: Get him a clip.

(Clerk hands clip to witness)

A The paper clip represents a man slightly bent forward, the base on the table, and the head and arms coming forward.

Now, whether he lifts or pulls, or is pulled forward, the same exact thing happens. Like a lever press, something happens at the lumbosacral area. The junction of it fixed with the movable portion of the spine, and like a grape prese or a wine press this thing comes down and causes damage.

Q Wouldn't the pull make the back go into hyper-flexion and make it pull forward that way?

A No, the pull makes it go usually -- now if you give me a pulling upward, such as a hanging type injury, maybe, but most pulling injuries that I have seen combined with lifting, and this is not an uncommon manner of injury when multiple people lift something and others let go, a man is pulled and this is a hyper-flexion --

MR. STEARNS: Can I have that stricken from the record?

THE COURT: Yes. Strike the last out. That's a generalization.

A As I understand it, this is a hyperflexion injury, not a variant of it.

Q There is nothing in the record that indicates it was anything other than a pulling-lifting of a hose, is that right?

A In the record, I don't know about, but in my report it says pulling a heavy hose.

THE COURT: You are speaking about the doctor's record now?

MR. STEARNS: That's right.

Q Now, did you considre the history given in the

records of the New Orleans Public Health Service Hospital?

A I didn't see them until this morning.

MR. STEARNS: At this time, your Honor, I offer the New Orleans Hospital records.

THE COURT: Yes. Any objection?

MR. GOLDSTEIN: They are in.

MR. STEARNS: No, they aren't. I have more extensive records than does Mr. Goldstein. I am now offering mine.

MR. GOLDSTEIN: May I see the ones that are in already?

THE COURT: Do you object to this that he is offering? That's the point.

MR. GOLDSTEIN: Judge, I would like to examine them if you don't mind.

THE COURT: All right, examine it. Is it certified, Mr. Stearns?

MR. STEARNS: Yes, sir.

THE COURT: Well, there ought to be no objection.

MR. GOLDSTEIN: I take it, Mr. Stearns, that the two extra pages that you have are of 1973 and not of 1971, when the accident took place?

THE COURT: No matter what it is, if it's

certified it's admissible, counsel.

MR. GOLDSTEIN: I don't suggest no, Judge. All I am suggesting is --

THE COURT: Well, I think so.

MR. GOLDSTEIN: No.

THE COURT: What is the objection to it?

MR. GOLDSTEIN: My objection is that these two records occurred, came into existence after the doctor's examination of April 1972.

THE COURT: Well, I don't think that makes any difference.

MR. GOLDSTEIN: I think it does.

THE COURT: Overruled. Admitted.

(Defendant's Exhibit I was received in evidence)

Q Doctor, I ask you to refer to this record, Exhibit I, and particularly to page 3, and read the section that is history of present illness.

A Can you help me if you have been through this before?

Q Yes, we will do it together.

42 year old, I guess that is white American seaman, who states he was pulling on a heavy hose on ship on June 8 when suddenly he had a sensation of something

"giving away," giving way, with pain in his low back on the right. Pain is constant with sharp pain on walking. Pain occasionally radiates down right thigh.

A Exactly.

Q Is there any mention whatsoever in this report of any accident whereby Mr. Porss says that he was pulled off his feet when a hose was let go?

A The report speaks for itself. It says what is says. Nothing more, nothing less.

Q Obviously. We can agree then, Doctor, that no such history is given in this report.

A The report speaks for itself. It says what it says.

Q Now, is it your testimony, Doctor, that you never inquired, you never did inquire into Mr. Porss' history of prior complaints of pain in his back, is that right?

A That's correct.

MR. STEARNS: At this time I would offer in evidence --

A Excuse me. Other than -- inquiry was asked, did you have a prior back injury? And the answer to that was that he didn't.

MR. STEARNS: At this time I offer in

evidence the Public Health Service records from San Francisco, California.

THE COURT: Mark it for identification. Then show it to Mr. Goldstein.

(Defendant's Exhibit J was marked for identification)

MR. STEARNS: May I be excused for a second and go out and get a drink of water?

THE COURT: Yes.

(Mr. Stearns left the courtroom)

THE COURT: Now you may look at it.

MR. GOLDSTEIN: Thank you.

(Pause)

THE COURT: Exhibit J for identification, counsel.

Any objection, counsel?

MR. GOLDSTEIN: Yes, sir.

THE COURT: What is the objection?

MR. GOLDSTEIN: The objection is that the record includes some medical records that have absolutely nothing to do with the back.

MR. STEARNS: Your Honor, I --

THE COURT: Let's see it. Is it paged, and if so, state the page on the record here and show it to

counsel.

MR. GOLDSTEIN: It's not a page, but this is the start of it.

THE COURT: Where is the end of it?

MR. GOLDSTEIN: It goes to --

MR. STEARNS: It's the entry dated June what? June 27, 1970.

THE COURT: Let me see it.

MR. GOLDSTEIN: Which is prior to the accident.

THE COURT: Well, it still may have something to do with it.

MR. GOLDSTEIN: Your Honor will note the word at the top of the page that indicates the area.

THE COURT: Well, that doesn't mean too much.

THE COURT: I want to take a brief recess inthe robing room with cojnsel and the reporter.

(In the robing room)

THE COURT: It savs something -- have vou read this?

MR. GOLDSTEIN: I haven't read the entire record, Judge. I just scanned over it.

THE COURT: I don't think it is necessary for you to read it. It relates to psychiatric

matters. Let me read it if I can.

41 year old seaman, or whatever it is, male. What is that, A-b-o-a-s?

MR. STEARNS: A-S, American seaman.

THE COURT: American seaman flown back from Saigon where he was taken off a ship. He was examined at an Army field hospital because of his expressed fears. Thought to be without foundation . That is life is in danger from three other crew members. DX. What is that?

MR. STEARNS: Diagnosis.

THE COURT: Their diagnosis was emotionally, somebody's diagnosis was emotionally unstable personality and paranoid features. He felt these three crewmen were going to kill him as they threatened because of his disagreements which arose from playing cards and from political discussions.

He not only feared them personally, but was fearful that they might hire someone to kill him because something is very cheap, if that's --

MR. STEARNS: Life is very cheap.

THE COURT: Because life is very cheap, I guess that is.

The patient also reports feeling particularly

endangered within the confines of the ship.

The patient was born in Estonia. He left there with three brothers at the age of, it looks like 12, for Sweden. He emigrated to this country shortly thereafter. His parents are now in Estonia. He has a brother each in Sweden, Australia and this country. He appears not to have close ties with his family although he maintains better contact with all of them.

He served two years in the army during the Korean conflict and was honorably discharged.

He was married in 1959 and divorced in 1964 because of mother-in-law trouble. He has five children, a boy, looks like two girls whom he sees about once each year. His relations with his former wife so and so, some name, I guess, lives in Illinois and her parents and children are amicable.

There have been no serious homosexual relationships since his divorce.

On mental status he is neatly dressed, I guess it is, and oriented in all spheres.

He is fearful and obsessed, looks like, about the danger from three men.

He is difficult to evaluate. The reality

of this, however, is of note, that he something, looks like C-O.

MR. STEARNS: Complains of.

THE COURT: That he complains of wild dreams, something kind of lost like I-n-t lost and weakened nerves. He appears to be of average intelligence and has no memory deficit. Appears mildly depressed and somewhat suspicious.

At the end it says acute, there is some conclusion, I guess, impression: acute paranoidal --

MR. STEARNS: Reaction?

THE COURT: Leading -- what is this word here?

MR. STEARNS: Acute paranoid reaction resolving--

THE COURT: So and so.

Well, why is this admissible, Counsel?

MR. STEARNS: Because of the fact that the case turns on credibility, because therefore the credibility, and beyond that the ability of Mr. Porss to accurately recount what had happened is at issue.

There is the additional factor.

THE COURT: Why isn't that admissible then, Mr. Goldstein?

MR. GOLDSTEIN: Because that has nothing to do with this accident, No. 1.

THE COURT: That's not so. It has something to do with his testimony. That's what counsel is saying.

MR. GOLDSTEIN: No. 2, that statement is in 1970 and says "resolving," which means clearing up. There is no proof in this record that --

THE COURT: On what date was this, Counsel?

MR. GOLDSTEIN: 1970.

THE COURT: Where?

MR. GOLDSTEIN: I don't know, Judge. I didn't read it but Mr. Steans said that it was 1970.

THE COURT: Well, what date?

MR. GOLDSTEIN: May I look at the record?

THE COURT: Yes. You better let him look.

MR. GOLDSTEIN: January 27, 1970, Judge. That's a year and a half before the accident.

MR. STEARNS: A year and a half before the accident. Now this, your Honor, there is a total unexplained gap in this man's work history from May 1970 which is now a matter of some four months after that entry was made until he joined this ship.

There was this: his last ship before the Overseas Aleutian was a ship that he got off of in May 1970. He went on the Overseas Aleutian in June 1971, nearly 13 months later.

Now, the proximity of that to this entry is a powerful suggestion that this man was somewhat still afflicted by this mental problem.

THE COURT: Well, wait. What evidence is there that he was still afflicted by it at the time of this alleged accident?

MR. STEARNS: Well, other than the fact that I undoubtedly could produce a psychiatrist to say that this --

THE COURT: Well, I'm not going to ask you to

produce any psychiatrist. This matter is badly enough involved without that.

MR. STEARNS: As I understand it, the diagnosis is acute anxiety reaction.

THE COURT: It doesn't mean necessarily, does it, that it was continued?

MR. STEARNS: It doesn't necessarily mean that. I'm saying this, that it is appropriate for me to bring this to the jury's attention (1) for the credibility issue, (2) --

THE COURT: I don't think it is true credibility here because the condition expounded upon in this report is considerable time before the accident.

MR. STEARNS: Right.

The other thing is --

THE COURT: The alleged accident.

MR. STEARNS: That is of course true.

The other thing is this, that the complaint that he had then of three seamen trying to get him, threatening him.

THE COURT: That isn't a physical thing.

MR. STEARNS: No, but his impression, his belief that he was in danger is in a way consistent with --

THE COURT: Now you are saying with an intentional

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something or other. You are back to that.

MR. STEARNS: No, I'm off that. There is a legal question. I'm just saying that there is this threat of consistency, not only in this accident, which he says was caused by something that people did to him - that's consistent with the fear he had in 1970, in January. And it is also consistent with the subsequent accident on the Longview Victory when he again says that somebody did something to hurt him.

THE COURT: If that was at the time of the accident, I would say he had something.

MR. STEARNS: It is close enough in view of the fact that it is January, that May was his last ship, and 13 months later --

THE COURT: It is about a year and a half.

MR. STEARNS: Why wasn't he working? I suggest that he was not working because he was disabled until June 6, 1970 or thereabouts for psychiatric reasons.

MR. GOLDSTEIN: Judge, he was on a ship in May of 1970, four months after this thing.

MR. STEARNS: And when he got --

MR. GOLDSTEIN: Mr. Stearns just said that he was working after this.

THE COURT: Will you step out just a moment,

please? I want to discuss this.

(Recess)

THE COURT: I believe,Mr. Stearns, I am compelled to sustain this objection. It is too remote, and there may be oth reasons. In any event, I sustain the objection to this part of this report.

Now, if there is anything else here that's planned to be offered, please --

MR. STEARNS: I am going to offer more than just this.

THE COURT: Point out what paragraphs you intend to offer then.

MR. STEARNS: Well, in view of the Court's ruling, I will suggest that these two pages, three pages --

THE COURT: Are they marked by number?

MR. STEARNS: They are not but they are --

THE COURT: Well, let's mark them. Are they dated? Yes. One is dated January 15, 1970. The plaintiff referred back to something. That's for psychiatric. Well, that's out.

Anything on that page that refers to physical?

MR. STEARNS: No.

THE COURT: Next page. What's that?

MR. STEARNS: That is now the psychiatrist's

writing, isn't it?

THE COURT: That's the one we read, isn't it?

MR. STEARNS: Yes.

And the next one is on the same topic.

THE COURT: Any other page that's physical?

MR. STEARNS: Yes. The first two pages, of course, have to do with complaints of back pain.

THE COURT: Let's see. This?

MR. STEARNS: Beginning there, yes. Lumbosacral spasm, substantial psychological component.

THE COURT: Well, that's out.

MR. STEARNS: Sir, that's entirely different. This is now 1967. That I believe is an integral part of this --

MR. GOLDSTEIN: Have you examined that, Counsel?

MR. STEARNS: This is 821 in this report. I think that might be admissible.

MR. GOLDSTEIN: 821 of 1967?

MR. STEARNS: 1967, yes.

THE COURT: Back pain. I would admit that, gentlemen.

MR. STEARNS: In view of the Court's ruling, I would suggest that these three pages be taken out. The rest is relevant.

THE COURT: That's fair enough.

MR. GOLDSTEIN: May I see these, Judge, for a minute?

THE COURT: Take out the three on psychiatric care.

MR. GOLDSTEIN: There is more than that, Judge.

THE COURT: Which one is it, Counsel?

MR. GOLDSTEIN: There is the next page which is dated February 10, 1970.

THE COURT: Is that psychiatric?

MR. GOLDSTEIN: Yes, which refers to psychiatric.

MR. STEARNS: I agreed to take that out.

THE COURT: That is the three pages you are talking about. Now we have four pages. This is psychiatric. They ran some tests at the same time.

MR. STEARNS: That is psychiatric. VDRL.

You have been reading these reports long enough. You know that that is a test for venereal disease.

That's psychiatric, right?

THE COURT: All right, X the pages that have been taken out and I will let counsel state what he agrees with and then there will be no dispute about it.

MR. STEARNS: In view of the Court's ruling, I will physically remove the four pages marked with an X

from the record.

MR. GOLDSTEIN: No. There will be more --

THE COURT: Let's look at it and see and ask him about it. Don't fiddle around so much.

MR. GOLDSTEIN: All of these pages, Judge.

THE COURT: Mark them, counsel, all those he says that you agree with.

MR. STEARNS: You would exclude a report dated 4/1/68,"patient complains chronic low back."

MR. GOLDSTEIN: All of the records involving the same time period, that is, January and February of 1970.

THE COURT: That is not so. I am allowing the matter of the pains in the back.

MR. GOLDSTEIN: That's 1968, Judge. I don't mind 1968.

THE COURT: I don't care what it is. It was a period before this accident. I'm going to let it in.

MR. STEARNS: Mr. Goldstein, can we then agree to take those four pages referring exclusively to psychiatric matters --

MR. GOLDSTEIN: We can agree, if you will, to take all of the treatment and all of the testing and everything else referring to treatment in January and

February of 1970.

THE COURT: If you can't agree, why, I am going to rule on it. I am going to rule that everything except psychiatric is to go in.

MR. GOLDSTEIN: Now, Judge, what is psychiatric? That is what we are talking about.

THE COURT: Well, talk together about it.

MR. GOLDSTEIN: They run -- Judge, can't we talk to you?

THE COURT: You can do it by yourself. You don't need me.

MR. GOLDSTEIN: Obviously we can't. What they did when he went in for psychiatric treatment, they took some tests all involving what they wanted to find out about this man.

THE COURT: I will say which ones are to go out.

Will you first, Mr. Stearns, mark the ones that you agree should go out?

MR. STEARNS: I do not agree.

THE COURT: Tell me what you agree with.

MR. STEARNS: In compliance with the Court's ruling, and to effectuate what you have ruled on, I say that what should be taken out are the pages marked with an X, being four consecutive pages.

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THE COURT: But you say no other ones?

MR. STEARNS: No other ones.

THE COURT: Let me look at the other ones then. This letter is not part of it?

MR. STEARNS: Yes, that can come off.

(Pause)

THE COURT: Wll, this first one has nothing about back pains, does it? It has the prostate.

MR. STEARNS: Yes, it does. 38. This is, as I read it, "38 year-old American seaman with two months' history of relatively right lower quadrant pain unrelated to food, position, also L-S, which is clearly lumbosacral pains, constipation, intermittent dysuria. Told he had UTD infarct east. P.E., moderate L-SA is lumbrosacral strapped muscle spasm. Posteriorly large bogie somewhat tender prostate. Impression: Probable prostatitis with psychological component."

THE COURT: Well, this has to come out.

MR. STEARNS: Your Honor, if I may say this, that I think I will get from this doctor testimony that pain of constant, complaint of constant back pain is sometimes caused by neurosis, that this is a fairly well-documented type psychological syndrome.

THE COURT: You go beyond this. I have got to

decide about this and neither one of you have helped me very much, I must say.

MR. GOLDSTEIN: May I suggest, since I haven't been able to get to this record, may I point out to the Court, with all due respect, what we are talking about here.

I am not concerned too much about this.

THE COURT: You don't object to this page?

MR. GOLDSTEIN: No, I didn't say that I am not concerned. I don't object.

What I am concerned about is these pages and the pages after the four pages that Mr. Stearns has agreed to take out.

THE COURT: Do these refer to psychiatric matters?

MR. GOLDSTEIN: Yes.

MR. STEARNS: Those are all X'd and we need not consider them.

THE COURT: Will you physically take out the ones that hav ebeen X'd, Mr. Stearns, and see if we can get down to earth again after abl this floating around?

Do you want to consent to go on with the doctor and finish this up later?

MR. STEARNS: We can finish it now, your Honor.

I don't think there should be any problem with these.

Now here, this is a physical test. Nothing to do with psychiatric.

MR. GOLDSTEIN: Given at the same time, Judge.

THE COURT: That doesn't mean a damn thing. You raise a lot of flies and molehills.

MR.GOLDSTEIN: This is totally irreleveant.

THE COURT: What does it say about physical?

MR. STEARNS: This is -- that is a report -- it is a hematologist's report, I believe.

THE COURT: What harm can that do?

MR. STEARNS: That is exactly the point.

MR. GOLDSTEIN: What harm?

Why should it go in? It is irrelevant.

THE COURT: You say it is irrelevant. You have got to have some basis for it.

MR. GOLDSTEIN: Judge, I always thought that the burden was upon the person asking that something be admitted to show--

THE COURT: Not entirely the burden. There may be some consideration.

MR. GOLDSTEIN: Mr. Stearns is now --

THE COURT: I am considering objections. That's all.

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Do you know what this is?

MR. GOLDSTEIN: That is a hematologist's report, Judge. It has nothing to do with this case.

THE COURT: What is that about, blood?

MR. GOLDSTEIN: Hematology would be blood.

THE COURT: What is your objection to this?

MR. GOLDSTEIN: That's irrelevant.

MR. STEARNS: You are just wasting time.

MR. GOLDSTEIN: No, you are just wasting time.

THE COURT: Don't slam each other. You just act like children.

All right, we will take the rest of it.

MR. GOLDSTEIN: That's also the same thing, Judge. Hemolytic strep..

THE COURT: All right, that's out.

MR. GOLDSTEIN: What is this, Judge? CV and stream urine. That's prostatitis.

MR. STEARNS: That is a fact in this case.

MR. GOLDSTEIN: That has nothing to do with it. That's just a lab report. All they did was run tests on him when they created a psychiatric report which your Honor says is out.

Your Honor is now saying the reports must be taken out because they are irrelevant but the lab reports

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have to go in. They have no relevance.

THE COURT: I don't think--

MR. GOLDSTEIN: They only have a relevancy to the report which your Honor is taking out.

THE COURT: I am going to take the bull by the horns.

MR. GOLDSTEIN: Same thing. Glass urine. That has nothing to do with this.

THE COURT: What is there in then?

MR. GOLDSTEIN: This is 1968. Your Honor has ruled that that is in. And I agree.

THE COURT: All right.

MR. GOLDSTEIN: Your Honor has ruled and I can't argue with you.

THE COURT: This is in. Mark this for identification.

MR. STEARNS: Your Honor, if I can just attach that to the remainder of the ones that are in and then offer them.

THE COURT: All right. Let's waste some more time.

(In open court)

THE COURT: That is now in evidence.

(Defendant's Exhibit J received in evidence)

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BY MR. STEARNS:

Q Doctor, I ask you to refer to the first page of these reports which are now Defendant's Exhibit J and to tell me whether or not on 8-21, which I think Counsel has stipulated is 1967, on August 21, 1967, whether or not Mr. Porss complained at the Public Health Service Hospital in San Francisco of back pain?

THE COURT: Is that the record?

That's all he is asking you, Doctor.

Can you answer that?

A I have to read this thing first, your Honor. I can't find it rapidly.

THE COURT: Take your time.

A Yes, among other complaints there is a statement: "Also L-S. pains and" --

THE COURT: What is L-S. pains?

THE WITNESS: L-S. is one of the abbreviations for lumbosacral meaning low back pain.

Q Was a physical examination done on August 21, 1967?

A Yes.

Q What did that physical examination reveal?

A What is that word?

Q Looks like "strap" to me.

A Yes. Moderate L-S strap.

THE COURT: Do you know what that means?

THE WITNESS: No.

Q Could it be lumbosacral course or strap?

A No. That I interpret as no, or is it an M with a circle?

Q An M with a circle around it. Muscle spasm. Isn't that what it says?

A Well, there is only one M and the circle around it so it could be an N O.

MR. STEARNS: Can I show it to the jury so that they can make an evaluation as to whether it is an N O or M O?

MR. GOLDSTEIN: Objection, if your Honor please. It is a medical report.

MR. STEARNS: It is just a matter of handwriting, your Honor.

MR. GOLDSTEIN: But the jury doesn't know how to evaluate that. They don't know what it means.

THE COURT: I will have to sustain the objection. You heard what the doctor says. If he can't read it, I don't know who can.

MR. STEARNS: Well, I can, your Honor, and so can this jury.

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THE COURT: Well, it is in evidence.

MR. STEARNS: Can I then pass it to the jury and ask them to look?

THE COURT: All right. Pass it to the jury.

MR. STEARNS: This is what is referred to. That is what the doctor can't say.

THE COURT: I don't know whether they can tell any more than anybody else. Certainly not more than the doctor.

MR. STEARNS: Well, I don't agree, your Honor, respectfully.

THE COURT: All right, let them look at it. Maybe your doctor will shed some light on it.

Q Now, Doctor, isn't it a fact that as long as August 1967 Mr. Porss was complaining about pain in his back and that he had some evidence of spasm in the back?

A First let's go back to the record and see what evidence of spasm is, and then --

THE COURT: Do you want to see this record?

THE WITNESS: Yes, your Honor, before I answer the question.

THE COURT: All right, as soon as the jurors get through, you may have it.

Give it to the doctor.

A We were reading the physical examination.

Q Why don't you read the entire thing, Doctor?

A Moderate L-S, which is clearly lumbosacral, I believe; strap, which I have no idea what it means in that connotation, and then that peculiar thing that you looked at which could be --

THE COURT: All right, pass that then. It could be what?

THE WITNESS: MM, I doubt, or no, or and, which there has been an expression. I can't say which it is. It looks a little more like No than MM but I will agree that you can look at it and read into it and, spasm, prostate large bogie somewhat tender. Small -- I can't be sure whether it is right or left-- inguinal direct hernia. No abdominal findings. Impression: Probable prostatitis with substantial abbreviated psychological components.

Do you agree with the translation?

Q Yes, I agree.

Doctor, is it significant that at that time, August 21, 1967, Mr. Porss was complaining of pain in his back and had evidence of muscle spasm, if that be the case -

THE COURT: Well, you can't ask him that. He already

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testified that there is some doubt as to what it is so don't try to ram it in.

Q Whatever they are, are these complaints and these findings significant?

A They are significant if the diagnosis is correct. The doctor who examined him at that time felt that he had a prostatitis.

Q Right.

Now prostatitis can cause low back pain, is that right?

A It causes a very low back pain, not the same as the pain he has. It is a lower, a more steady pain.

Q Doctor, not the same as the pain he has.

You don't know what pain he has if he has any, is that right?

A The answer was shortened to indicate that the pain he has is influenced by exertion and rest, whereas prostatitis has a minimal, the pain of prostatitis has a minimal influence with exertion and rest.

Q Doctor, referring to the next page of this, I ask you now to read the entry dated 8/28/67.

A Give me a help.

Q "Complains of pain in the right arm when lifting objects that radiates back to the right shoulder and into

the left neck.

A I agree.

Q So he is complaining then of pain in his neck and shoulder, is that so?

A That's what it says.

MR. GOLDSTEIN: If your Honor please, that has nothing to do with the lower back.

THE COURT: Well, the doctor has explained it. I think he is entitled, and counsel is entitled to cross-examine him on this.

Overruled.

Q Now, passing on then to the next one, April 1st, 1968, what does that entry say? And this is the same record.

Does it say"recurrence of symptoms in low back, likely prostatitis, has discharge in A.M."?

A Yes.

Q "Prostatitis suspected"?

A Right.

Q And various things are given by way of treatment, is that right?

A Yes.

Q All right. Thank you.

Now let me take this again and I will show you

the next page.

Will you please read that? And this is an entry dated April 1st, 1968.

A Where shall I read it?

Q Begin with the handwritten portion, if you would.

A "Pertinent clinical history: Patient with chronic low back pain R/O"meaning rule out spondylolisthesis, which doesn't have, as everybody knows by now.

Q What is the date of that?

A April 1st, 1968.

Q What does the word "chronic" mean to a doctor?

A Longstanding.

Q In April 1968 Mr. Porss had longstanding complaints of pain in his lumbosacral spine, is that right?

A I have to go-- the record says he had a chronic low back pain.

The answer to that question is yes.

Q As of that time?

A Yes.

Q And can an infected prostate cause spastic muscles in the low back?

THE COURT: Haven't you explained that, Doctor?

THE WITNESS: Not quite. He said can it cause back pain and the answer was yes, but of a different type.

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Now the question is can it cause spastic muscles in the low back.

THE COURT: All right.

Q Can it?

A I think it is within the range of possibility; yes, it can.

Q Doctor, have you ever seen before today the records now in evidence as Defendant's Exhibit C, the records being of the United States Public Health Service Hospital at Houston Street?

A No, I have not seen them except I glanced at them this morning before the trial started.

Q Now I will ask you to glance at them again, particularly the ones that are set off by paper clips.

Will you read that first one for me?

MR. GOLDSTEIN: If your Honor please, if the doctor is going to read the record, then I ask that he be permitted to read the record and not specifically to some sections.

THE COURT: Well,he is asking him to read this record and I assume you are going -- you will question him about those portions of it. is that correct?

MR. STEARNS: I certainly am.

MR. GOLDSTEIN: But he has asked the doctor to

read only those portions.

THE COURT: Well, you can ask him to read the rest of it instead of taking up time here.

MR. GOLDSTEIN: I ask that the doctor be allowed to read it now, sir, before he is asked questions.

THE COURT: All right, read the whole thing to yourself, Doctor.

Q Read the entire entry of June 17, 1970.

THE COURT: You are not concerned with any other matter at this time?

MR. STEARNS: Not at this time.

THE COURT: All right.

A It gives his weight and blood pressure, which are normal; pulse and temperature, and it says "pains in chest and back since January 1970."

Q What is the date again of that? Is it June 17th?

A June 17th. The year is indistinct. Is it 1970?

Q Yes, sir.

A It may be because it is after 1969.

Q Right.

Now, isn't that significant, sir, that the fact in June 1970 this man had a six-month history of pain in his back?

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A This is a patient who is clear from the records has or had a chronic prostatitis prior to the injury and back pain is such a general symptom, and it occurs in prostatitis, that it doesn't necessarily mean by any means that his current condition is due to the prostatitis or that the prostatitis contributes in any way to his disability.

Q Talking, Doctor, about prior history of pain in the back, have you seen the records of the Public Health Service Hospital in New Orleans, the records of treatment given Mr. Porss at the hospital? I mean were you shown the hospital records?

A I saw them and glanced at them this morning.

Q Just glancing at them, Doctor, and reviewing what was found there -- are the findings made at the hospital in New Orleans consistent with a sore back developed by an individual who has been doing heavy work?

(Question read)

A May I see the record?

Q Surely.

(Handing)

A Now, what was the question? Are the findings or symptoms?

Q The symptoms.

A No. The pain of heavy work, the back pain produced by heavy work in people who are unused to it is more of an ache relieved by rest.

This was a constant ache, and therefore the word "constant" means not relieved by rest, and with sharp pain on walking. The symptoms are not quite the same.

Q All right.

Now, Doctor, again turning to the record at Houston Street --

THE COURT: That's Exhibit what, sir?

MR. STEARNS: That would be Exhibit -- let's see, your Honor.

Q I ask you to read now an entry dated June 21, 1971. Read that in its entirety, if you would.

A Help me.

Q "Patient states he sprained his back a couple of weeks ago while pulling up heavy cable. Was hospitalized New Orleans, U.S.P.H. with diagnosis of L-SS, which is lumbosacral strain, 6/12/71 to 6/18/71. Also has pain right testicle, radiating to right testical wher lifting."

A Right. That's what it says. I agree.

Q What is the significance of radiating pain to the right testicle after this alleged accident? Is there

any?

A I think there was a notation in the New Orleans hospital record about an inquinal, possible inquinal hernia, the lifting injury, and if you are asking me what is the possible significance, the answer is he may have developed an inquinal strain related to a potential hernia.

Q If somebody had a prostate infection in June 1971, would it be likely that he would have pain in the testicle?

A The prostate infection doesn't produce pain solely in the testicle. It produces a deep-down, low-in-the-groin pain, but not in one testicle.

Q It also causes pain in the back, isn't that so?

A It can cause a type of very low back pain, more in the sacrum than in the lumbosacral area.

Q Now, you know that this man was -- first of all, will you acknowledge that there is a neurotic component in the complaints of back pain?

MR. GOLDSTEIN: Objection.

THE COURT: Sustained.

Q Doctor, of course you rely and you did rely in your examination on the credibility of Mr. Porss?

A To a point, yes. Up to a point.

Q Okay. Up to a point. But it is a substantial

factor in your determinations, isn't it? Will you admit that much?

A I will give you more.

THE COURT: Is what a substantial factor?

MR. STEARNS: The credibility of Mr. Porss.

A If on the examination I feel that the patient is totally incredible, I will say so, but there are facets of the examination which lead me to believe that his history complaints and physical examination are totally credible.

Q Doctor, --

MR. STEARNS: I move to strike that answer as not responsive.

MR.GOLDSTEIN: I think it was very responsibe.

THE COURT: Read the question and the answer.

(Record read)

MR. STEARNS: I move to strike that as not responsive.

THE COURT: I will leave it.

Q When was Mr. Porss declared fit for duty following this accident? Now I am referring to page No. 8.

A There is a note in his chart from the Houston Street Hospital dated August 6, 1971 and it says FFD and I will interpret that as fit for duty.

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THE COURT: August 6, 1971. FFD.

All right.

Q Now what else does this page of these records say? I ask you now to read this.

This orthopedic consultant this date noted "no orthopedic or neurological findings." Is that right?

A Yes.

Q What is the impression gien by the doctor?

A "L-SS" meaning lumbosacral strain or sprain resolved. E.D."

Q And a prescription of Librium was given to Mr. Porss, isn't that so?

A Yes.

Q And Librium is a tranquilizer, isn't that so?

A Yes.

Q You of course haven't seen the orthopedist's report, have you?

A I have not.

Q You never asked anybody to show it to you?

A I didn't.

THE COURT: I say this without criticism but I think it might have been very wise if counsel for the plaintiff had given these reports to the doctor.

Q Doctor, read the orthopedist's report.

"Patient states that on 6/8/71 he --

A --"sustained.--

Q --"sustained --

A -- "an acute strain.

"Q --an acute strain in the low back while pulling a very heavy hose aboard ship. He claims no improvement in his low back" --

A --in spite of rest --

Q --"in spite of rest and physiotherapy. Patient states that on exertion the --

A --"pain radiates --

Q --"radiates to the left groin."

A No. "to both groins and testicles --

Q --"to both groins and testicle"--

A Right.

Q "Orthopedist's examination. Patient walking with the aid of a cane but he doesn't appear to be in any discomfort."

A Right.

Q "He moves around, dresses and undresses and gets on and off the examination tablewith great agility."

Now, on the next page --

A "Range of motion."

Q "Range of motion of the trunk is not restricted

in any plane. He can touch the floor with his fingers without difficulty."

A "And there is --

Q "And there is no lumbar paravertebral muscle spasm. He reports mild tenderness to deep pressure over the L-S joint region and the upper sacrum. Straight-leg raising test is negative at 8-90 degrees bilateral. Neurological examination is negative. X-rays of the lumbosacral spine are negative.

"Impression: The patient has recovered from the low back strain sustained two months ago. No orthopedic condition is present at this time.

"Patient is fit for duty."

A That's what it says.

Q Now, in your report, you noted that at the time of your examination in 1972 that Mr. Porss had a cane with him, and you say that was self-prescribed, is that right?

A Yes.

Q As far as you know, no doctor ever told him to use a cane, is that right?

A That's the information I have. Correct. Yes.

Q Are the findings made by the orthopedist at the Houston Spreet Clinic of great agility moving on and off the

table totally inconsistent with the need to use a cane?

A Not quite totally inconsistent. That is the rub.

Q All right. I will withdraw the word "totally." Inconsistent.

A Not even inconsistent. I have seen so many patients where the doctor said they were perfect specimens and the patient said no. And symptoms and examination--

THE COURT: Well, that is a gereralization.

THE WITNESS: Yes. I am coming from the general to the specific, your Honor.

A And in this patient at that time this doctor said that he is an athlete, practically, and going back to the general, I have seen this so many times it is sickening. The patients are still complaining and the doctor doesn't ind anything.

MR. STEARNS: I move to strike that.

THE COURT: Yes. Strike out the latter part.

Don't proceed with a lecture on it, if I may call it that. Just answer the questions.

Q So you see no inconsistence between his great agility and his using a cane at the same time?

THE COURT: He has answered it in substance, I think.

MR. STEARNS: Yes.

Q Did you ever give Mr. Porss a copy of your report?

A I don't know.

Q Did you ask Mr. Porss or suggest to Mr. Porss that he go back to the Public Health Service Hospital?

THE COURT: After what time?

Q After he was made fit for duty on August 6, 1971 either with your report or with news of your findings and to ask for a not fit for duty slip?

A It was not within my province or power to do so.

THE COURT: The question is, did you do it, Doctor?

THE WITNESS: No, I didn't.

THE COURT: That's the answer then.

Q At that time do you know whether or not Mr.Porss did in fact do that?

A I don't know. I saw him April 14, 1972, and then again in 1975.

THE COURT: We are going to have to recess soon, Mr. Stearns. Maybe you can get through with this cross.

Q Now, referring to page 16, I ask you to read that.

THE COURT: Exhibit?

MR. STEARNS: Exhibit C.

A August 17, 1972.

Q "Carries letter from orthopedist Dr. George Seaman, 98 Lafayette Street, Brooklyn."

A Lafayette Avenue.

Q Saying he has permanent partial disability.

Now solely on the basis of that report of yours they marked him not fit for duty,isn't that so?

A I don't know whether that is the sole reason but they did mark him not fit for duty.

Q Now what we have is a recitation in the records by a doctor of a report, a letter from you, and immediately following that is a disposition, not fit for duty.

Now, you will agree, Doctor, that there is no impression, no findings, no diagnosis made at that time?

MR. GOLDSTEIN: If your Honor please, I object to this question because it is misleading.

The fact remains this man --

THE COURT: Overruled. I think the doctor understands. I don't think he is going to be misled at all. If you don't understand the question, just say so.

THE WITNESS: I understand the question.

THE COURT: He understands it.

A The record speaks for itself. It quotes that he has the letter saying that I felt he had a permanent

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partial disability, and they said without further ado, without further comment. Disposition: Not fit for duty.

Whether they did or didn't examine him or did or didn't question him I have no knowledge nor does the record state.

Q Now, do you know whether or not this letter of yours precipitated a second examination?

A I don't know.

Q By the orthopedist?

A I don't know.

Q No, that is inaccurate. I withdraw the question in that form.

THE COURT: The question is withdrawn.

Q Do these records reflect a second evaluation?

THE COURT: What is the question?

MR. STEARNS: Do the records show that the plaintiff was evaluated for a second time by the orthopedic consultant at the U.S.Public Health Service Hospital?

A I believe so. The photocopy is not clear. It says "Date of request, February 25, 1972."

Would that be the same as the first examination?

Q No. The other one was August 6, 1971.

A I will take your word for it. This is prior to it. This is March 10, 1971.

Q No, that is clearly an error, sir. Date of request: 2-25-1972.

THE COURT: Wait a minute.

I don't understand your question. You just let your voice fall and it is just out of the blue.

MR. STEARNS: All right.

Your Honor, the problem is that there is a date of request dated February --

THE COURT: Ask questions. Don't tell about problems. We have got an awful lot of problems.

Q What is the date of the request?

A February 25, 1972.

Q All right.

Now what appears to be the date of the orthopedic evaluation?

A March 10, 1971.

Q Now, does that mean to you, reading those two things together, that an error has been made and that the real date should be March 10, 1972?

A Could be March-- in its place in the chart it would suggest March 10th, 1971, and that the February 25th, 1972 is an error. Maybe we can read through the record and the details and tell which is which.

Wait a minute. I must --

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Q This would be an orthopedic consultant before the accident?

A No. The accident happened in June.

Oh, I must agree that this really is 1972 because the doctor makes reference to -- he was last examined by me in August of 1971. Therefore this March 10th refers to 1972.

Q Yes, sir.

A Okay.

Q Now will you read that report? This is the second orthopedic evaluation.

A "Patient was last examined by me on August 6, 1971 for evaluation of low back pain secondary to injuries sustained on June 8, 1971.

"It was my opinion at that time that the patient had incurred a low back strain which responded to treatment and that he was fit for duty."

(Discussion off the record)

A "He has not worked but continues to complain of low back pain with occasional readiation to both testicles.

"Orthopedic examination: As in my report of August 6, 1971, there are no objective findings. The patient moves around briskly and gets on and off" --

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MR. GOLDSTEIN: If your Honor please, may we have the doctor read it?

THE COURT: The doctor has stated that he was aided by the attorney.

Do you want to help the doctor or do you want to impose greater time for him to stay here?

MR. GOLDSTEIN: If the doctor needs help with a word, he can ask for it.

THE COURT: Go ahead, Doctor.

MR. GOLDSTEIN: My attitude is I don't like Mr. Stearns reading faster than the doctor is reading and leading the doctor.

I would like the doctor to read it if he can, and if he needs an occasional bit of help, he can ask Mr. Stearns.

THE COURT: I suppose we have got to do this piecemeal then.

Go ahead.

A "The patient moves rapidly, briskly and gets on and off the examining table with -- now come back here -- gets on and off the examining table with great difficulty?

Q Agility.

A "agility."

Wait a minute now.

Q Facility.

A Facility.

Q Facility means ease, doesn't it?

A I will agree on that, yes.

"Range of motion of the trunk is not restricted in any plane and there is no paravertebral muscle spasm. Straight-leg raising test is negative. Neurological examination is negative. X-rays February 25, 1971, lumbosacral spine is"--I'm not sure about that is, but it is essentially normal.

"Opinion: No orthopedic condition is present.

"Recommendation: The patient is FFD, meaning fit for duty. On the basis of subjective complaints in the low back on exertion" -

Q "I would be inclined to have the patient" --

A --"have the patient fitted with a low lumbosacral corset support when he returns to work.

"Neurological examination" --

Q -- consultation is also advisable to" -

A Wait a minute. "Neurological consultation is also" --

Q "advisable to 'explain' pain radiating to both testicles."

A Yes.

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38 eb:mg 115 Seaman-cross

Q Now what is he saying there? What does he mean when he says "to explain the pain radiating to both testicles"?

MR. GOLDSTEIN: Objection.

THE COURT: What is the objection?

MR. GOLDSTEIN: The record speaks for itself.

THE COURT: He is an expert.

Overruled.

A A radiating pain is generally assumed to be due to nerve root pressure, and they wanted a neurologist to confirm or deny the diagnosis.

Q Radiating pain in the testicles is sometimes a symptom of prostatitis or other infections?

A It depends on where it radiates from. They didn't say where it radiates from but it is assumed, but this is an assumption that I would make from reading the record that it radiates from his back into the testicle and this is due to nerve root pressure. In a prostatitis it radiates from the lower part of the groin to the testicle.

THE COURT: How much longer are you going to be on cross-examination? We may have to come back this afternoon.

(Discussion off the record.

THE COURT: Will you complete this now?

Q This orthopedist, the Public Health Service orthopedist, makes no mention of any radiation from any nerve root pressure, is that right?

A He says --

THE COURT: Let him look at it.

A He says to explain the radiation to both testicles.

Q And the word "explain" is in quotes, isn't it?

A Yes.

To"explain."

What is the significance of putting the word "explain" in quotes?

A Well, that is a very special significance in medicine. This doctor didn't believe this patient. This doctor worked down at the clinic at Houston Street, and for him, almost everybody with a back pain is a liar, a thief, and a faker, so he says, "Send him to a psychiatrist and explain, or a neurologist.

THE COURT: Wait. Do you move to strike that?

MR. STEARNS: Yes, sir.

THE COURT: Strike that out and disregard it.

Now just stick to your answers, Doctor.

A The "explain" is his signal to the psychiatrist

that the man is a liar, thief and a faker and I want a psychiatrist to say so.

MR. STEARNS: I have no further questions.

THE COURT: All right, we will recess until 2:15, ladies and gentlemen.

Please continue to heed my instructions.

And I want to ask counsel a question, if you will remain a moment.

All right.

MR. STEARNS: Yes, your Honor -- Mr. Goldstein, I have given Mr. Goldstein -- I have here, your Honor, the original medical log of which I had a copy yesterday, and Mr. Goldstein --

THE COURT: All right, you want to mark this in substitution of the copy?

MR. STEARNS: No. I want it in evidence and I have a man here who can identify it.

THE COURT: All right, do that, and we will get rid of it.

You may step down. I guess you will have to come back after lunch. I'm sorry, but --

THE WITNESS: I'm sorry, your Honor, but it is not your fault.

THE COURT: We have to give Mr. Goldstein another shot at so-called redirect with respect to you.

...

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41 eb:mg 118 Seaman-redirect

AFTERNOON SESSION

2:15 p.m.

G E O R G E S E A M A N, resumed:

THE COURT: Doctor, I don't need to tell you but you are still under oath.

THE WITNESS: Yes, sir.

THE COURT: Proceed with your redirect examination.

REDIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q Doctor, I ask you to look at the records, Defendant's Exhibit G, I guess that is.

THE COURT: What is that, Counsel?

MR. GOLDSTEIN: These are medical records.

THE COURT: Which ones?

MR. GOLDSTEIN: The ones prior to the accident of June 8, 1971.

THE COURT: All right. Exhibit G you said?

MR. GOLDSTEIN: Yes. They are marked G.

THE COURT: All right.

Q Doctor, those records indicate the prostatitis condition, do they not, in general?

A From memory, yes, but I would have to go find them. But go ahead.

Q Doctor, I would like to know where you notice that the prostatitis is listed, can you tell us whether or not the plaintiff was marked fit for duty with the prostatitis?

A If you know wehre it is, could you tell me, please?

THE COURT: He wants your assistance now, just as he utilized the assistance of Mr. Stearns.

Q Doctor, I have some other records that attach the dates.

I am talking about a date of 8-28-67.

Do you see that date there?

MR. GOLDSTEIN: He has got the wrong records.

THE COURT: Well, get your papers ready, if you can.

Q Doctor, this is Exhibit J.

THE COURT: J you are referring to now, is that correct?

MR. GOLDSTEIN: J.

THE COURT: Instead of G?

Q August 28, 1967.

MR. STEARNS: 21.

THE WITNESS: 21 or 28?

MR. GOLDSTEIN: 28.

Q That is according to what I have.

43 eb:mg 120 Seaman-redirect

A I have the 28th of 1967.

THE COURT: What is the question?

Q Doctor, theplaintiff had a prostatitis condition at that time as so shown in the record?

A Yes.

Q Was he marked fit for duty or not fit for duty?

THE COURT: There may be no marking on that date.

THE WITNESS: Yes, there is. The writing is not good but I interpret it best as fit for duty, FFD.

THE COURT: That was what date?

THE WITNESS. August 28, 1967.

THE COURT: All right. I have it.

What's next?

Q Doctor, on November w7, 1968 -- and this is the Staten Island records; do you have those?

A The Staten Island records?

Q Do you have any records from Staten Island, Doctor?

THE COURT: What exhibit is it, Counsel? I thought you knew.

A No, I'm sorry, I don't have the Staten Island records. I have the outpatient records of Houston Street which is related to Staten Island.

Q All right. May I --

43 eb:mg mg 121 Seaman-redirect

THE COURT: He says he has Houston Street but not Staten Island.

Q May I refer you to the date of Juhe 16, 1969 at the Public Health Service Hospital at Houston Street?

A I have it.

Q Doctor, does that tell what that examination was for?

A As best I read it, "follow up GI distress" meaning gastrointestinal.

Q Would that be the prostatis?

A UGIWWL. I don't recognize the abbreviations. They gave him Mylanta, which is a stomach upper intestinal medication and the impression was due to duodenitis, totally unrelated to this condition.

Q Was he marked fit for duty?

MR. STEARNS: What is the date?

THE WITNESS: June 16, 1969.

A Yes, they did mark FFD.

Q Now, Doctor, when you saw Mr. Porss in April of 1972, did you consider that his complaints were consistent each with the other?

A Yes.

Q They formed a pattern of pain, all of which were consistent in each area that he complained of, each with

the other, is that correct?

MR. STEARNS: I object to the form.

Q Were they consistent, each with the other, that is, were they bizarre in the sense of not being related at all?

THE COURT: You have got two or three questions. Now will you make up your mind and ask one question at a time, Counsel?

Q Doctor, did you consider the complaints to be bizarre in nature or consistent in nature?

A They were not bizarre. They were almost routine with respect to a very common condition of an unstable back.

MR. STEARNS: I object to the answer beyond "they were not bizarre." Everything else is not responsive.

THE COURT: Yes. Strike it.

Q Well, Doctor, did you consider his complaints consistent with each other?

A Yes.

Q Can you explain why?

A Well, the history was of an injury sustained by hyperflexion, forward bending, and the symptoms were of a disability made worse by sitting, standing, lifting, bending, pushing and pulling, all of which are related

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to commercial-type activities which increased back pain in the patient were his physical findings.

Q Now, Doctor, bringing you forward to the treatment given to theplaintiff at New Orleans -- and this is Defendant's Exhibit I- - Doctor, it is true that this was the first hospitalization and treatment of the plaintiff following the accident of June 8, 1971, is that so, sir?

A Yes.

Q Doctor, can you tell this Court and jury what condition the doctors, that is, the Public Health Service doctors in New Orleans, Louisiana, found this plaintiff to be suffering from?

A Do you mean the diagnosis?

Q The diagnosis, sir.

A Acute lumbosacral sprain.

Q And when he was discharged to travel back to New York, what was the condition given upon his discharge?

A "Not FFD. Follow up local in New York."

Q And what condition did they say that he was suffering from? I mean at that time.

A Again, do you mean diagnosis?

Q Yes, sir.

A Acute lumbosacral sprain.

Q And this was the result of six days of inpatient

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treatment in the hospital?

THE COURT: What was the result?

MR. STEARNS: I object to the form.

THE COURT: Sustained as to form.

MR. GOLDSTEIN: The diagnosis -

THE COURT: Reframe your question.

Q The diagnosis was the result of six days of hospitalization by the plaintiff in New Orleans Public Health Service?

MR. STEARNS: Objection.

THE COURT: Well, sustained.

I don't know what that question means. The result of the treatment or the result of the examination, or what?

Q Doctor, how long was the plaintiff in the Public Health Service Hospital in New Orleans?

A Six days.

Q That was inpatient or outpatient?

A Inpatient.

Q THat means that he was in the hospital?

A Yes, in bed.

THE COURT: Was this diagnosis based upon a number of days in that hospital, then, Doctor?

THE WITNESS: No. The diagnosis was not dependent

upon the number of days.

THE COURT: What was it based on, hospitalization period or prior to it, or the entry, or what?

THE WITNESS: No. The diagnosis was based upon the history, the physical findings, the symptoms, and the x-ray findings.

THE COURT: All right.

Q And the diagnosis was again what?

A Acute lumbosacral strain.

Q Did that have anything to do with prostatitis?

A No.

Q Do you find anything in that record concerning prostatitis?

A (No response)

Q As a symptom?

THE COURT: At that hospital.

Q At that hospital, at that time, as a symptom?

A Well, the record is incomplete but from the record available to me in my brief inspection of it, I cold see no record of his prostatitis.

Q Now, Doctor, after that the plaintiff went to the Hudson-- the Houston Street Clinic in New York City, is that correct, sir?

A Yes.

THE COURT: Outpatient?

Q That is outpatient clinic only, is that correct?

A That is correct, yes.

Q Now, Doctor, if you will, what is the diagnosis given of the plaintiff's condition the first day that he was at the clinic, that is June 21, 1971?

MR. STEARNS: I am going to object to that as improper redirect. I think this was all gone into.

MR. GOLDSTEIN: Gone into by the defendant.

MR. STEARNS: No, it was not. It was gone into by you on direct examination.

MR. GOLDSTEIN: I didn't go into this at all.

MR. STEARNS: Then it is clear -

THE COURT: Well, it probably is not strictly speaking redirect but I will allow it. I have a liberal view. I don't think it is necessary. It is repetitious.

A June 21, 1971."Impression: L-SS, meaning lumbosacral strain resolving."

Q Now, Doctor, he was then found fit for duty ultimately in August of 1971, is that correct, sir?

THE COURT: He was what?

Q August 6th he was found fit for duty.

A Yes.

49 eb:mg 127 Seaman-redirect

Q Do you see anything there concerning a return visit?

A Yes. The bottom line, just above the signature, it says "RTC PRN."

This means "Return to clinic"; and the PRN is an abbreviation in Latin, an old-fashioned meaning for "whenever he wishes to."

THE COURT: Return for what?

THE WITNESS: Return to clinic.

THE COURT: For?

THE WITNESS: Whenever he wishes to do so.

THE COURT: PRN?

THE WITNESS: PRN.

Q What does that indicate to you, when they tell a patient to "return to clinic whenever he wishes to"?

A That's still not discharged from their care and he is eligible to return if and when he wishes.

THE COURT: It means that he returns only if he wishes, is that right?

THE WITNESS: Yes.

THE COURT: Okay.

Q Did he in fact return to the clinic?

A Yes.

Q Now, did he return --

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THE COURT: What day did he return on?

MR. GOLSTEIN: I am asking him that.

Q Did he return on November 23, 1971?

A I have that he first returned September 7, 1971.

Q And, Doctor, at that time he was marked unfit for duty and that was for bronchitis, wasn't it?

A I believe so, and, yes, NF, not fit for duty.

Q Now, Doctor --

THE COURT: That was November 7th?

THE WITNESS: I'm sorry, sir. September 7th.

THE COURT: September 7th?

THE WITNESS: Yes.

THE COURT: And what does it say about his condition then?

THE WITNESS: Well, it is a visit unrelated to his back. It is related to his chest cold or something about that, or bronchitis.

THE COURT: All right. I think we are entitled to hear that. It was a chest cold?

THE WITNESS: Or something like it. Pain in upper thorax.

Q They marked it bronchitis, didn't they?

A It doesn't say so.

THE COURT: What does it say exactly?

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THE WITNESS: Pain - I will need some help -- pain in upper thorax,upper thoracic spine.Steady for past two or three months. Unremitting ache-type feel -- also, a word I can't --

Q It says chest pain.

A It says chest pain.

THE COURT: Oh, you want to help now, Counsel? It is a poor rule that doesn't work both ways, sir.

MR. GOLDSTEIN: Judge, I didn't press Dr.Seaman.

THE COURT: No, you didn't press him. Neither did your adversary.

MR. GOLDSTEIN: I thought he was doing that.

THE COURT: All right. It is a triviality. If he wants help, let him have it, just as I said before.

Q In any event, does it show a chest pain?

A It says "chest pain."

Q Very good.

And he was marked not fit for duty?

A Correct.

Q Doctor, how getting down to November 23, 1971, can you tell us the result of --

A Wait. Let me find the record.

Q Okay.

A I have it.

Q Very good.

Can you tell us what diagnosis is made there of his condition?

A Chronic bronchitis and L-S strain. lumbosacral strain.

Q Now that's all before your examination of Mr. Porss in April of 1972, isn't it, sir?

A Yes.

Q At the time of that visit you hadn't seen him?

A That's correct, I had not.

Q And the doctors in the Public Health Service Hospital marked him not fit for duty for lumbosacral sprain, isn't that correct?

MR. STEARNS: Objection. That speaks for itself. It is susceptible of two interpretations.

THE COURT: Yes.

When was he marked not fit for duty - in November, if it was, 1971?

THE WITNESS: November 23, your Honor.

THE COURT: He was marked not fit for duty.

Q How about December 21, 1971?

THE COURT: What is the question?

Q What was his diagnosis on that date?

A (No response)

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Q By the Public Health Service doctors.

A I need some help, I'm sorry. I cannot read this writing. You people have studied this with a microscope.

Q I haven't.

A It states that back pain, severity - and I can't read the wirting and I can't tell much. I do recognize NF which means not fit. I see RTC four weeks, return to clinic in four weeks. The rest of the writing - if you studied it and spent a lot of time with each letter you might be able to decipher it.

THE COURT: Actually these hieroglyphics from the hospital ought not to be admitted in evidence in court as exhibits. Exhibits ought to be in English and translated in advance and then we wouldn't have this trouble.

Q In any event, on December 21, 1971, he was marked not fit for duty, is that correct?

A Yes.

Q Now, go forward to January 11, 1972 and that is the next time that he was there, isn't that true?

A Yes, I have it.

Q All right. Can you tell us what the diagnosis was then?

54 eb:mg 132 Seaman-redirect

A They don't phrase the diagnosis. The writing is by a different man or at least it is a little clearer.

It days "back pain present as before." Some writing I can't really read. "Tends to aggravate" something. Disposition: NF. Not fit for duty. RTC, return to clinic three weeks.

Q So that he was stillnot fit for duty?

THE COURT: Yes, he said so. Why do you have to ask him all over again?

Q Doctor, it was because of the back condition--

MR. STEARNS: Because of complaint of back pain.

MR. GOLDSTEIN: That's right. And that's why they marked him not fit for duty.

Q Is that right, Doctor?

A Yes.

Q Now on to February 1st, 1972, can you tell us the result of that visit in terms of diagnosis?

A If I read the word -- again, they don't phrase diagnosis. They just don't put down a diagnosis. The first word I see, if I read it wrong, correct me. I say cough. Has been something or other; "feels well at present. Still has low back pain with left numbness of leg. Lumbosacral x-rays"-- I can't read all the rest of it.

THE COURT: You will have to call somebody from the hospital, I guess, to read it by this time.

Q Doctor, what is the result of the visit? Was he marked FFD or not FFD?

A I don't see anything about NF or FFD. I don't see either one.

Q All right.

Doctor, would you go on to February 25, 1972?

A February 25, 1972, yes, I see the date stamp.

Q May we have the result of that visit?

A Pain in lower back, I think, same as before, with occasional something or other.

THE COURT: Well, that doesn't help.

THE WITNESS: I agree with you, your Honor.

Q Doctor, what was the result of the --

A Disposition: NF. Not fit.

Q Doctor, the not fit for duty was because of the back condition, is that correct, sir?

MR. STEARNS: Objection.

THE COURT: Sustained.

Q What was the reason for the not fit for duty?

THE COURT: I don'tknow that the reasons are given. They say so-and-so and then they mark him not fit for duty. That may or may not be the reason. The

verbiage used before it is -

Q Doctor, you have seen the Marine Hospital records before, the clinic records before?

A I have seen some.

THE COURT: You don't say you can read every hospital record.

THE WITNESS: Oh, no, sir, not this writing or any hospital records. Many of them are impossible.

Q Doctor, what is the reason in your opinion for the not fit for duty on February 25, 19 --

THE COURT: I don't know how he can give an opinion. He wasn't there. He didn't make the examination.

Go on, please.

Q Can you give me any answer, Doctor?

THE WITNESS: I think his Honor said not to answer it.

THE COURT: I sustained the objection. You don't have to answer.

MR. GOLDSTEIN: I thought he was going to be allowed to answer.

Q Doctor, there was a fit for duty on March 10, 1972, is that correct, sir?

A Yes.

Q Now, after that, Doctor, did the plaintiff return to the clinic?

A Yes.

THE COURT: According to the record?

THE WITNESS: Yes, according to the record, he was seen March 10 and marked fit for duty and April 21st, and I believe it is 1972.

It is not completely clear. And again he was marked fit for duty.

Q And ultimately, Doctor. you examined him by that time, that is, in April of 1972, is that correct?

A Yes.

Q And ultimately the plaintiff did have a copy of your report and he turned it over to the doctors at the hospital, is that correct?

A Yes, in August of 1972.

Q And that was August 17th?

A Yes.

Q 1972?

A Yes.

Q And he was marked not fit for duty, is that correct?

A Yes.

Q In other words, Doctor, is it true that they

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deferred to your examination and your diagnosis of the plaintiff's condition on August 17, 1972?

MR. STEARNS: Objection, your Honor.

THE COURT: Sustained. Objection sustained.

Q Doctor, did they defer to your opinion that he was unfit for duty at that time?

MR. STEARNS: Objection.

THE COURT: Sustained.

Q Doctor, was he considered unfit for duty on August 17, 1972 by the Marine Hospital doctors who saw him that day?

MR. STEARNS: He was marked not fit for duty. It is so conceded. The records say that. But why? Who knows?

THE COURT: Sustained as to any reasons.

Q Well, Doctor, is there any reason given for the diagnosis other than the fact that they read your report?

A They didn't give a diagnosis.

Q I know, sir. And did they read your report and that's all it says?

THE COURT: How does he know whether they read it or not?

Q Does the record show anything else other than the fact that the plaintiff, Mr. Porss, turned in your

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report to them?

A The record just says "Carries letter from orthopedist Dr. George Seaman, 99 Lafayette Avenue, Brooklyn, saying he has permanent partial disability. Disposition: NFFD. Not fit for duty."

Q So that it was on the basis, Doctor, of your report that he was marked not fit for duty at that time?

A I think that assumption is best left up to the jury.

Q Doctor, was he then marked fit for duty in September of 1972?

A Yes.

THE COURT: Fit for duty?

THE WITNESS: Yes, your Honor. September 26, 1972.

Q Doctor, you note that in the report by the Marine Hospital doctor in March he mentions --

THE COURT: March of what year, Counsel?

MR. GOLDSTEIN: 1972, Judge.

Q He mentioned referring the plaintiff to the psychiatric department?

A I don't see the reference that you are talking about.

Q Well, didn't Mr. Stearns point that out to you at one point, Doctor?

A Yes, but he didn't say psychiatric.

Q Oh, I'm sorry. To explain perhaps the complaints.

A I don't know or I don't recall, rather, exactly when that referral was made. It was in reference to a neurological examination and my answer was regarding an "explanation" of his radiating pain.

Q Doctor, is there any neurological report in that record following that date?

THE COURT: Anywhere or following it?

MR. GOLDSTEIN: Yes.

Q That you saw?

A I haven't seen any neurological report but I will defer to eitherof you gentlemen if there is one.

Q So, Doctor, I gather from the fact that you have not seen any neurological report that no neurological report was ever given to explain the radiation of the pain complained of by the plaintiff?

MR. STEARNS: Objection.

THE COURT: Sustained. That doesn't follow. That's not logic.

Q Well, Doctor, what do you draw from the fact that there is no neurological report?

THE COURT: What is that question?

Q What do you draw from the fact that there is no neurological report?

MR. STEARNS: Objection.

THE COURT: Sustained. The absence of something does not mean anything.

MR. GOLDSTEIN: No further questions.

RECROSS-EXAMINATION

BY MR. STEARNS:

Q Doctor, do you have the record from New Orleans in front of you?

MR. STEARNS: That would be Defendant's Exhibit I.

A Yes.

Q Speaking of the specific findings made on physical examination there, Doctor.

THE COURT: What is the date?

MR. STEARNS: This would be the 12th or 11th of June, 1971.

A The report is not dated but it would be either the 12th or 13th. He was officially admitted the 12th and the intern's history and physical is not dated.

THE COURT: All right.

Q There is a finding there of tenderness in the back, isn't there, Doctor?

A (No response)

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62 eb:mg 140 Seaman-recross

Q Back right paravertebral tenderness and spasm in lumbosacral area?

A Yes.

Q Would you admit, Doctor, that tenderness in the lumbosacral area with spasm can be caused by heavy lifting, or lifting of fairly heavy objects?

A A lifting injury can certainly well cause it and it is a common cause of it.

Q First of all, Doctor, you said here today after lunch that the accident was a hyperflexion accident, right?

A Yes.

Q Forward bending?

A Yes.

Q Now, your report, your initial report of April 14, 1972, makes no such reference to hyperflexion accident, does it?

A It doesn't put it in words that way, but the history of the injury is consistent with a hyperflexion injury.

Q That's because I said, "Wasn't this a hyper-flexion injury," wasn't that right?

A No. I think the words were first used by me and you may have repeated them.

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Q Can you have tenderness and some muscle spasm as a result of doing physical labor without an injury?

MR. GOLDSTEIN: Objection, if your Honor please.

THE COURT: Overruled.

MR. GOLDSTEIN: He slips in at the end of the sentence, "without an injury." That isn't the history that was given, that there was no injury.

MR. STEARNS: We are not bound by the history given by Mr. Porss certainly.

MR. GOLDSTEIN: You mean you just want to decide that you want to throw it in?

THE COURT: Yes.

I overrule the objection, Mr. Goldstein. Now that's it.

A In a patient who has done an unsual heavy day's work, who has fatigue at the end of the day, and if he--

Q Now, Doctor, --

A No, no, I have to answer your question. It is not just that smple yes or no.

THE COURT: Let him answer. He now has and I have directed that he answer it.

Now you keep quiet this time.

A In a patient who has done an unusual amount of heavy work during the day, who has as his weak point,

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without an injury- that is the fact situation you gave me-- but who has as his weak point a back condition without an injury, he will have back pain and weakness and fatigue and discomfort in his back.

I don't think he will have muscle spasm and tenderness. At least, I have never heard of it reported. But that type of situation is really not within the knowledge of doctors because we don't examine patients usually at the end of the day who just have fatigue. They don't come to doctors.

Q Are you aware that Mr. Porss had not worked for 13 months before June 8, 1971?

A I have no knowledge of his industiral history.

Q Did you make any inquiry into his work history?

A I have it only that as of April 12, 1972, when I first saw him, he had not worked since the injury of June 8, 1971.

Q And you didn't know that he had only worked from the 7th to the 11th since May 1970, a period of more than, almost two years?

A I did not.

Q Before your first examination.

A I didn't know his industrial or work history prior to the injury other than what I have already said.

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Q You admit, Doctor, that if a person doesn't do any physical work for a period of 13 months, and he gets in effect out of shape--

MR. GOLDSTEIN: Objection to this, Judge. It is so speculative.

MR. STEARNS: I will withdraw it.

THE COURT: I don't think so. Overruled.

MR. GOLDSTEIN: He just said he will withdraw it, Judge. He recognized that it wasn't proper.

MR. STEARNS: I didn't, Mr. Goldstein.

THE COURT: He can withdraw any question no matter how good it is or how poor it is.

MR. STEARNS: We are not going to sit here for another week arguing with you.

THE COURT: Even if he is your adversary.

Q Now, Doctor, in brief, he had an acute lumbosacral sprain according to the doctors at New Orleans Hospital, is that right?

A I think they used the word strain.

Q Strain right.

A Yes.

Q On the 21st of June he comes to the clinic in New York at which time he has got a resolving lumbosacral strain?

A Let me refer to the record but I believe you are correct; yes. Those are the words that they used, yes.

Q And then when he goes on, on August 6, 1971, at the recommendation of the orthopedist, he is said to have a resolved lumbosacral strain, is that right?

A That's at the general clinic they said resolved. I think the orthopedic consultation comes a little bit later.

Q What is the date?

A I have here August 6, 1971, L-SS resolved, E.D.

Q It happens that the first orthopedic examination was the same date?

A Okay. I will take your word for it.

Q That means it is all over, right?

A Resolved means resolved. I think the word speaks for itself in English.

Q And the next time he goes to the Houston Street Clinic, what is his complaint?

A If you are referring to after August 6, his next visit is September 7, and this is a part we were not able to read completely but we did try hard and I think this is almost entirely, if not entirely, for his chest. I can't see anything relating to his back in answer to your

question.

Q So he is there for complaints of pain in his chest, is that right?

A Yes.

Q And there is no reference to back is that right?

A I couldn't see any.

THE COURT: What year was that?

MR. STEARNS: September 7, 1971.

This is the first trip back after the strain resolved.

Q No treatment for the back on that date, is that right?

A That is correct.

Q Now, between that period of time when he got there in June and when he was discharged in August, was he seen in July, specifically July 21st?

July 19th, is it?

A Yes, July 19, 1971.

Q And what was his complaint at that time? What were his complaints?

A Patient continues to complain essentially the same trouble. Pain is now radiating down both legs and now getting pain to the back of his neck and head.

Q What else does he complain about?

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A Also complains of sexual weakness.

Q Was he given a tranquilizer?

A I don't see it written.

Wait a minute, maybe the other page.

Yes. Librium.

Q What was he given?

A Librium.

Q In your opinion, Doctor, did that Librium prescription have anything to do with his back complaints?

A Doctors frequently prescribe it.

Q That's not the treatment of choice, is it, Doctor?

A There are many doctors who ascribe to the belief that Librium is good and effective treatment for back conditions. I don't. But it is a commonly used prescription. The most common prescription of all of them ever used.

THE COURT: Well, it is a tranquilizer. That's all it is supposed to be, isn't it?

THE WITNESS: Yes, that's what it is and the most common prescription.

Q What is it prescribed for?

A Everything.

Q Including anxiety?

A Everything except cancer, including cancer. It

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is the most common written prescription today. Billions of prescriptions are written for it.

Q Now, when he comes back after being made fit for duty, first of all, of course, he has got his complaint about his chest on September 7th, 1971.

Now, he comes back on September 16th, 1971.

What does he have at that time?

A (No response)

Q Still has persistent, is that, hacking cough?

A Hard to read but I think that's a correct word, yes.

Q So on the 7th of September, and the 16th of September, he is back complaining of cough, cold, whatever, chest pains?

A Yes.

Q Is that right?

A Yes.

Q How about September 24th? At that time does he still have a persistent cough?

A Yes, that's what it says.

Q Nothing during this period of time having to do with the back, isn't that so?

A Nothing is written.

Q Can't we rely on that, if there was any treatment

to the back, that it would be written down?

A Oh, no. That is the problem.

MR. STEARNS: I object to the recitation.

MR. GOLDSTEIN: Why? He asked the doctor, and the doctor is now answering him.

MR. STEARNS: No.

THE COURT: The objection is overruled.

Q Go ahead.

THE COURT: Not the objection by defense counsel.

A In my medical clinic or in any visit to a doctor or any transcription of events other than an actual tape recording or a stenographic record, nobody could possibly write every single word that transpired.

The fact that they didn't write anything about his back is no proof in any way that he didn't or did have back complaints.

THE COURT: All right.

Q Well, didn't it involve a value judgment by the doctor, if he did, if he did have a back complaint that this wasn't sufficiently serious even to note?

A I would go along with that, yes.

Q This guy is griping about his back, is that right?

MR. GOLDSTEIN: What was that?

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THE COURT: What is the question?

MR. STEARNS: This guy is griping about his back.

MR. GOLDSTEIN: I don't know what that means, Judge, but I ask your Honor to tell Mr. Stearns to --

MR. STEARNS: I withdraw it.

THE COURT: Withdrawn.

I wish you would hesitate a little before you get into a withdrawal situation, however.

Q How about October 6, 1971, does that say"cough slightly better today"?

A Yes.

Q So he is still there, still being treated for some kind of chest congestion, isn't that so?

A Apparently so.

Q Now that's October. How about October 27, the second visit in October; does that say"feels much better today"?

A "Feels much improved."

Q Improved?

A Improved. You were guessing. But I can't read the rest of it. I will agree to "feels much improved." And that's with difficulty.

Q What is the last word? Is that cough?

A I think so, yes.

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Q So do you take from that, although it is difficult to read, that the reference is to improvement in the cough situation and nothing to do with the back?

A I think so.

Q Now, on November 23, 1971, what is the lead entry here in that clinic record?

MR. GOLDSTEIN: Objection the use of the word "lead."

MR. STEARNS: The first one.

THE COURT: All right.

A Cough.

THE COURT: What does it say?

A We are stuck again. Cough.

Q Something, at present?

A Two words. Cough blank blank at present.

THE COURT: It might be most anything.

THE WITNESS: I agree with your Honor.

I can't make it out.

Q The first complaint noted on November 23, 1971 has something to do with his cough?

A The first word in the medical write-up is cough. That we can decipher. The remainder of it not so easily.

Q Now the impression. He also does say again now for the first time after August 6, something about

back.

He says "still has persistent lower back" -- do you see that?

A Yes, and I think that last scribble, chicken scratch, is pain.

Q Right. I would agree.

Now there are two impressions given, is that right? The first one is chronic bronchitis, isn't it?

A Yes.

Q And other one is?

A L-S strain, lumbosacral strain.

Q Based obviously on the man's complaint of pain, isn't that so?

MR. GOLDSTEIN: Objection to that.

THE COURT: Sustained as to that.

Q Within the four walls of this entry, sir, what if anything supports a doctor's impression of L-S strain?

A That's the rub. We cannot write every single paragraph, setnence, dot and conversation that we have with patients. We cannot document it with tape recorders.

THE COURT: All right. That's enough. You have explained it. This isn't the first time you have explained it either.

Q But just looking at this record, this entry --

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A They didn't write a complete or even an incomplete or any notes regarding his back examination. This is a general medical clinic. The men who staff it are internists or general practitioners. Their contact with back conditions is remote at best. They refer them out to specialists.

Q As they did in this case, is that right, on two occasions?

A Yes. And they very rarely make remarks about back pains when a patient has bronchitis or a chest complaint.

Q Still, Doctor, all we have to go on is "still very persistent lower back pain"and thre lines here,"L-S strain."

A I agree

Q With no examination, no findings intervening?

A That is correct. That's the record that speaks for itself. If the doctor examined him, he didn't document it with a written or handwritten or typewritten report.

Q In your opinion, Doctor, would that support the inference that the impression lumbosacral strain was arrived at solely because Mr. Porss complained of pain in his back?

A No. Not the least bit. As I said --

THE COURT: All right, the answer is no.

You don't need to emphasize it.

THE COURT: Well, you have got a doctor waiting, Counsel.

MR. STEARNS: Yes, sir. I will be as --

Q Now on December 21, 1971, there is again the word "cough" and it is very difficult to read the entry there.

A I see the word, yes, among many others.

Q So there is a notation of this persistent cough on December 21, 1971?

A Yes, sir.

Q Now, does the cough, is there a cough reference also on December 21, 1971?

A That's one of the words that we can read pretty well, thank goodness. It also says back pain.

Q Back pain and cough?

A Yes.

Q That's right. How about on February 1st, 1972? Is the first entry there again"cough has improved"?

A I agree with your reading, yes. Cough has improved.

Q How about February 25, 1972? Does it say "cough has disappeared"?

A I agree, yes.

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Q During this entire period of time of alleged disability due to some kind of back problem, the guy has got a cought and he is being treated for it, is that right?

(Question read)

MR. GOLDSTEIN: If your Honor please, will Mr. Stearns please not use the word "the guy"? I would like him to be --

MR. STEARNS: I apologize.

MR. GOLDSTEIN: With a reasonable amount of respect.

THE COURT: Yes. You need not ask it again because we will assume it's changed.

A Yes. During that period he did have some type of bronchitis with a persistent cough which apparently eventually resolved.

MR.STEARNS: I think that's all I have.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q Doctor, one question.

On November 23, 1971, that is the time that you remember the record talked about chronic bronchitis and the back itself --

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A Yes, but can I see the record?

Q Do you recall the use of the words "persistent back pain"?

THE COURT: Show it to him. These things are all in evidence, Counsel.

Q Didn't I hear the word "persistent" used, Doctor?

A Yes, the word is in there.

Q And what does the word "persistent" mean?

THE COURT: Anybody knows what it means.

Q Doctor, is that an indication to you that that back pain had continued for some time up to the point of November 23, 1971?

MR. STEARNS: Objection.

THE COURT: Sustained.

Q What does it indicate to you, Doctor?

MR. STEARNS: Objection.

THE COURT: Sustained.

It indicates persistence, that's all.

MR. STEARNS: Alleged persistence.

THE COURT: Yes. That's right.

All right. That's all?

MR. GOLDSTEIN: That's all, Doctor.

THE WITNESS: Thank you very much.

THE COURT: Thank you.

(Witness excused)

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MR. STEARNS: At this time the defendant calls Dr. Lodico.

- -

V I N C E N T L O D I C O , called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STEARNS:

Q Doctor, would you state your professional education and qualifications, please?

A I obtained my pre-medical education at Columbia University and received a BS degree in 1937.

I then attended the New York Medical College, Flower Fifth Avenue Hospital and received an MD degree in 1940.

I received a license to practice medicine and surgery in New York State in August of 1941.

I had a two year rotating internship at the City Hospital which is now known as the Elmhurst Hospital Center of of Queens.

After that I had approximately five years of a surgical residency training at the New York Postgraduate Hospital which is presently known as the University Hospital.

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Included in that time was a one-year surgical preceptorship with a former head of the AMA, a Dr. Charles Gordon Haight.

"Preceptorship" means an intimate presurgical relationship with Dr. Haight who was the Clinical Professor of Surgery at that institution.

After that I became an attending surgeon on the staff of St. Clare's Hospital in New York City, the Columbus Hospital in New York City, and for a number of years I was also on the Fracture & Orthopedic Service of Columbus Hospital.

I am a diplomate of the American Board of Surgery. I am also a fellow of the American College of Surgeons. I am a diplomate and fellow of the International College of Surgeons.

I hold a specialist's rating for treating workmen's compensation cases in the State of New York, and I have the code letters of SAC. The S stands for specialist. The A stands for major general surgery. The C stands for major traumatic surgery, which is the surgery of fractures, dislocations, sprains and other forms of violence to the body.

I am part of the teaching staff of the St. Clate's Hospital and with the staff we teach postgraduate

surgery to the residents who are taking up this field of medicine.

I belong to the usual national, State and local medical organizations.

THE COURT: All right.

Q Doctor, did you examine Leroy Porss at the request of one of the attorneys in the law firm I work for?

A Yes.

Q When did this examination take place?

A On October 7, 1974.

Q Now, at that time you were told, were you not, that Mr. Porss was claiming that he had had an accident and that he had sustained certain injuries?

A That's correct.

Q And what injuries were these alleged to be?

A Lumbosacral sprain, a chronic unstable lower back.

Q And at that time were you also informed that x-rays -- and I am talking now about either by plaintiff or his attorney -- x-rays of the lumbosacral spine were negative?

A Yes.

Q That means normal?

A Right.

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Q Were you also told, either by plaintiff or his attorney, that electrodiagnostic studies by Dr. Seaman were normal?

A Right.

Q Now, did you ask Mr. Porss for a past history?

A Yes.

Q Now, when you asked for a past history, what in essence did you ask him, or what did you inquire of him?

A Well, the past history is oriented to the injuries that are being claimed. In this particular case:

Did you ever hurt your back before? Did you have any back problem before this accident?

Q Did you ask those questions of Mr. Porss?

A Mr. Porss, or whichever attorney was present, I don't know who.

Q What did they say?

A Past history was none.

Q No prior injuries, no prior back difficulties?

A Right.

MR. GOLDSTEIN: No prior back problems, was the word.

Q Problems. What does the word "problems" mean? Is that coextensive?

A Difficulty, problems, and, in essence, it means

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pain.

Q Now, he then was asked, was he not, what his present complaints were?

A Yes.

Q Now, what then did he complain of? And we are talking, of course, about October 7, 1974.

A Well, I will quote my own report.

THE COURT: Let it be marked, Counselor, please.

Q You are now reading, is that right, Doctor?

A Yes.

MR. STEARNS: Please mark this for identification.

(Defendant's Exhibit L was marked for identification.)

xx Q I ask you to read the present complaints.

A "The patient complains of pain in lower back. On occasions it radiates to his right hip and right testicle during inclement weather.

"His back stiffens when sitting or working in one position.

"At times he gets cramps in his legs and feet. This pain also starts from his lower back and it also extends up to his neck."

Is it accurate to say that this individual had

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quite generalized physical complaints?

MR. GOLDSTEIN: Objection, if your Honor please.

THE COURT: Yes. Sustained.

Let me hear the reporter read the answer.

(Record read.)

Q Is it accurate to say, Doctor, that Mr. Porss had multiple complaints?

MR. GOLDSTEIN: Objection.

THE COURT: That is evident, Counselor.

Q Did you conduct a physical examination of Mr. Porss?

A Yes.

Q And what essentially did you do to --

THE COURT: What was the nature of your examination?

Q What was the nature of your examination?

A The nature of the examination was the examination of the patient with particular emphasis to the areas where he had complaints, and also to the areas that were claimed to have been injured.

In addition to that, of course, there was the general overall appraisal of the patient to help orient me during the specifics of the examination.

Q And what did this examination disclose?

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A Well, he was completely oriented mentally. He walked without any difficulty. He did not limp. He was completely oriented mentally.

His nutritional status was excellent, and I noted no evidence of any gross first impairments or neurological impairments. He was wearing a low back support which I asked him to remove, and which he did, and the lordosis of the lower back, which is the hollow of the back, normally present, was maintained.

Q When you say "maintained," it means that it was normal there?

A Yes.

THE COURT: What is that lordosis?

THE WITNESS: Lordosis, your Honor, is the hollow of the small of the back and is against the hump curve that one has in the upper spine.

THE COURT: What did you observe about his back in that respect?

THE WITNESS: The lordosis was preserved. In other words, the normal curvature of the spine was maintained.

THE COURT: It had not changed from the normal?

THE WITNESS: That's right.

A I also had the patient placed through different

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ranges of motion and he exhibited a complete range of active movement, which means he does it himself in passive movements which I would assist him in, and both of these varieties of movements, bending forward, backwards, bending to the side and twisting to the side, all of these movements were normal.

I didn't see any evidence of muscle spasm. There was no wasting of the muscles of the back which would denote loss of use of these muscles.

And I didn't see any scoliosis, which is a twisting of the spine toward the side, or tilting of the pelvis, which means that the one hip will be riding higher than the other.

I also had him squat and he went down and came up without any difficulty, and all of these motions he performed without any pain even when he did the flexion of the spine at which time the fingers reached the floor.

Q Is that an excellent range of motion and flexion of the back?

A Yes.

I didn't note any sensitivity along the course of the sciatic nerve trunks which are the big nerves that go in back of the thighs starting from the crease of the buttock down to the calf and to the sole of the foot.

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These nerves were not tender to the application of finger pressure.

Q You went on then to the usual routine tests for evaluation of possible back injury, isn't that so, Doctor?

A Well, this test is really all inclusive. If there is any abnormality involving muscles, ligaments, bones or nerves, these tests are aimed at picking those abnormalities out.

THE COURT: Did you find any abnormalities?

THE WITNESS: No, sir. He had the muscles of the trunk and lower extremities normal.

The reflexes, which are the ankle jerks, the knee jerks, reflexes of that type, were normal.

He didn't complain of any numbness in either of the lower extremities, and then I pressed along the lower back, which is known as the lumbar region, and also the pelvis, which we call the sacroiliac joints and also the lumbosacral joint, and these were not tender to touch.

I did certain leg tests which are standard and some more important than others. The two most important, of course, are known as the flip test and the Lasegue test.

Q What are those?

A Straight leg raising with the leg stretched out

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bringing it up this way.

The flip test merely flips the foot up this way.

Now, since the sciatic nerve goes behind the thigh, the calf, and curves around the inside portion of the ankle to the sole of the foot, if that nerve is impinged upon in the lower back, then, in doing this and flipping it up this way, it would stretch the nerve and produce an intensive spasm and pain in the lower back.

Q Did any such intense spasm and pain or, in fact, any spasm or pain --

A No. There was no pain or spasm. The test was perfectly normal.

And some of the others I did were the Patrick test and the jugular impression test.

I asked him if he had any specific problems and he indicated to me that he had a partial numbness which involved the entire half of his body on the right side. This covers the head, the trunk, as well as the upper and the lower extremities on that side. And of course this does not follow anatomical pathway, and it is known as a purely functional complaint and is not any sign of any compression of any nerve root in the lower back.

Q When you say "functional," Doctor, that is a

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term of art, is it not? What does "functional" mean?

A It is a complaint maint by the patient that is not supported by the medical findings or the knowledge of anatomy of the body, things of that sort.

Q Is it what you would characterize as a bizarre complaint?

A I don't like to use terms like that.

In examining a patient, a doctor visualizes the anatomy. A doctor should know -- I know in which direction the sciatic nerve goes down, and it would only affect, let's say, the extremity on the side where the sciatic nerve is involved. If it is going to hit one-half of the head and the trunk and the upper extremity, of course there is no way that the sciatic nerve is going to go up there, and then you will involve everything, and have a split-down-the-middle phenomenon which is characterized by people that have these functional complaints, of course there is no anatomical explanation for it. It is a purely subjective complaint made by the patient and is recorded by the doctor, but has no significance in so far as any back, low back injury is concerned.

Q And it is politely called "functional," is that so?

A It is not polite; that's a very nice word to

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use and it is neither impolite nor polite; it's an acceptable medical term.

Q So it is a term that a doctor would use when discussing something with another doctor, is that right?

MR. GOLDSTEIN: Judge, I don't know what that means. All I know is that it is snide, Judge.

THE COURT: Sustained, Counselor.

MR. GOLDSTEIN: It's snide.

THE COURT: Sit down. You have been sustained.

Q Now Doctor, in essence, what did your physical examination of Mr. Porss reveal?

A The examination, in essence, was entirely normal.

Q Nothing wrong?

A Nothing objectively or physically wrong with his spine; nothing wrong with the motions of the spine; nothing wrong with the muscles of his spine which would indicate that he was using all his muscles properly.

Q And that, of course, is significant, isn't it, Doctor?

A Well, the conclusion is that objectively he has a normal spine. He had normal flexion, normal appearance of his muscles, normal curvatures, normal leg tests. What else can you use except that it's a negative examination?

Q Now Doctor, there has been a discussion of pain in the testicles claimed by Mr. Porss. You have reviewed some of the or all of the hospital records, have you not?

A Well, whatever I saw initially when I examined this patient, and also what I saw in court today.

Q You did examine a number of records and then you were shown additional records here today, isn't that right?

A Yes.

Q Now, you are aware that this man has a history of prostate infection, are you not?

A Yes.

Q And that this history is before and after this alleged accident?

A Right.

Q Now, can pain in the testicles be caused by a prostate infection?

A Not only can it but it is a classical complaint of prostatitis. It is the way the pain from the prostate is referred when a patient has an inflammation of that organ because the testicles pass and are joined, functionally and anatomically, the prostate by the spermatic cord which ends up in the testicle.

Q Can testicle infection be caused by gonorrhea?

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A Absolutely.

Q Is there anything in the hospital records that indicates whether Mr. Porss has had a history of gonorrhea?

MR. GOLDSTEIN: If your Honor please, I object to this onthe ground that your Honor has previously ruled on this subject and Mr. Stearns has deliberately thrown this matter before the jury.

* THE COURT: I don't recall specifically ruling on this but I am going to sustain the objection.

MR. GOLDSTEIN: Mr. Stearns, I hope you are satisfied. You struggled for four days to get that in.

THE COURT: Now, no comment.

MR. GOLDSTEIN: And you finally got it in.

THE COURT: You sit down.

MR. GOLDSTEIN: If your Honor please, I ask for a mistrial on the ground that Mr. Stearns deliberately disobeyed your Honor. Your Honor told him, in your Honor's robing room, that it was not to be put in.

MR. STEARNS: That is not the case. There was no such discussion.

THE COURT: That is not so. I deny your motion.

Now continue and complete your examination, Counselor.

MR. GOLDSTEIN: If your Honor please, I object until we have this out once and for all.

THE COURT: There is no further matter to do with. I sustained your objection and I denied your motion. Now will you please continue.

Q Doctor, I have also asked you to consider --

THE COURT: And the jurors may and should -- I am asking you to disregard these comments by counsel.

MR. GOLDSTEIN: That is laughable. That is laughable.

THE COURT: Will you go out and laugh about it then? And I again say to --

MR. GOLDSTEIN: It is one of the ugliest things I have ever seen. Mr. Stearns doing a thing like that is one of the --

THE COURT: I want no more comment from you, sir.

MR. GOLDSTEIN: Your Honor will get comment from me to protect my client. You will get it any time. That is what attorneys are supposed to do.

THE COURT: Will you come into the robing room, gentlemen, with the reporter?

(In the robing room.)

THE COURT: Now, I have ruled on these questions

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and when rulings have been made, that must end any complaint. The judge in this Court House, any judge in this Court House, is faced with making rulings on these questions. You have your right on appeal, if there is any error.

MR. GOLDSTEIN: That isn't important.

THE COURT: Now wait. You keep quiet and I am going to tell you this: If this continues, I shall consider causing you to show cause as to why you should not be held in contempt.

Now we will go back and please remember what I said.

MR. GOLDSTEIN: And now may I put a statement on the record, since your Honor has put one on?

MR. STEARNS: I want it noted that Mr. Goldstein is now shouting.

THE COURT: Yes. Calm down.

MR. GOLDSTEIN: I showed your Honor, not more than a half hour ago when Mr. Stearns tried to get this gonorrhea nonsense in, a record showing the gonorrhea thing, and your Honor ruled at that time that it was not allowed to be put in.

MR. STEARNS: No, sir. No, sir.

THE COURT: Show it to me, will you. Show me any record about gonorrhea. I don't remember any, do you?

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MR. STEARNS: No, sir.

THE COURT: This is absurd.

MR. STEARNS: That word has not been mentioned.

(Mr. Goldstein left the robing room.)

(Pause.)

(Mr. Goldstein entered the robing room.)

MR. GOLDSTEIN: We were talking before about blood tests that were taken.

THE COURT: Show me the paper, will you please.

MR. GOLDSTEIN: These are papers that were all taken out of the records.

THE COURT: All right. Show me any paper about blood tests or venereal diseases.

MR. GOLDSTEIN: They all talked about blood tests. Mr. Stearns and I both admitted that they were tests of the blood.

THE COURT: Go ahead. Tests of the blood does not necessarily mean venereal disease.

MR. GOLDSTEIN: Wait a minute. I know where it is.

(Mr. Goldstein left the robing room.)

(Mr. Goldstein entered the robing room.)

MR. GOLDSTEIN: I thought that they were in the psychiatric report.

THE COURT: Is there anything you want to show me about gonorrhea?

MR. GOLDSTEIN: I can't point it out but I remember that it was mentioned.

THE COURT: Well, no matter whether it was mentioned or not, I have sustained the objection and I will also advise the jury to disregard the question itself.

MR. STEARNS: Would you also, your Honor, if you are doing that, instruct the jury that there is no evidence that there was any prior determination by the Judge, yourself, on the question of mentioning that word, and of course I except to the exclusion of this line of questioning.

THE COURT: Yes. All right.

MR. GOLDSTEIN: Your Honor is now going to rule as he wants?

MR. STEARNS: No, no.

MR. GOLDSTEIN: As he wants, after your Honor --

THE COURT: I will tell you on the record how I am goirg to rule.

MR. GOLDSTEIN: And I would like to know.

THE COURT: Now stop this slamming around that you repeatedly do. If you don't behave like an attorney in this court --

MR. GOLDSTEIN: I think I do.

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THE COURT: Well, you may think so, all right, but then be content.

I am simply going to say that I sustain the objection and I will ask the jury to disregard the question itself, but there was nothing in any agreement relating to any such question at all, so let's go out.

(In the courtroom - jury present.)

THE COURT: Now, jurors, I already sustained an objection to this question, and I also ask you to disregard the question itself, but I also must add that there is no indication on the record of any particular arrangement with respect to any of the background of this question.

Proceed with your direct.

DIRECT EXAMINATION (Continued)

BY MR. STEARNS:

Q Doctor, have you reviewed these records? I am speaking of Defendant's Exhibit I, and they are the New Orleans Hospital records.

A (No response.)

Q Doctor, are any of the findings -- refer to the findings on examination of this man's lower back.

THE COURT: What is your question, please?

MR. STEARNS: The question is now coming as soon

as he gets that, your Honor.

A I have seen these records.

Q Can those symptoms of those findings be caused, in your opinion, Doctor, by somebody doing fairly rigorous physical labor?

THE COURT: Please. You let your voice fall, Counselor. I'm sorry but please speak up.

Q Can the tenderness that was allegedly observed or observed at New Orleans be caused by doing fairly heavy fairly physical labor?

MR. GOLDSTEIN: Objection, if your Honor please.

THE COURT: As to form, sustained. I don't think it is clear what it means.

Q Well, the question is this, Doctor:

Certain physical findings related to this man's back were found in June 1971?

A Yes.

Q Now, I ask you to review all of them. Are any of them inconsistent with what could happen, what could happen to somebody who is doing fairly heavy physical labor who is not used to it?

MR. GOLDSTEIN: I object to it.

THE COURT: I still sustain the objection as to form. I don't think it is clear at all.

Q Can a man develop tenderness in his lower spine as a result of doing a lifting job?

MR. GOLDSTEIN: Objection, if your Honor please.

THE COURT: Overruled.

A The patient could sustain tenderness in his back if he does heavy lifting and if his spine had not been properly prepared by not being in good tone and volume, such as not using his spine for a long period of time.

MR. GOLDSTEIN: Objection, if your Honor please. There is nothing in the record here to indicate what Mr. Porss was doing for the thirteen months before.

THE COURT: I overruled your objection. Now he has answered. If you have any complaint now, you may move to strike the answer.

MR. GOLDSTEIN: I move to strike the answer as not being responsive.

THE COURT: Let us have the question and the answer read.

(Record read.)

THE COURT: The motion is denied.

Q Is that true as well of the other matters observed, or findings made at New Orleans?

First of all, perhaps we should say what they are. What were they?

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THE COURT: I don't know what your question means, Counselor.

MR. STEARNS: I will withdraw it.

That is all. Thank you.

CROSS EXAMINATION

BY MR. GOLDSTEIN:

Q Doctor, do you know what Mr. Porss did during the thirteen months prior to the accident?

A If he was working, I know what he was doing. If he wasn't working, I don't know what he was doing.

Q Doctor, you don't know?

A No.

Q You didn't examine during 1971, did you, Doctor?

A No.

Q You have no idea what he did in that thirteen-month period, do you?

A I just said that.

THE COURT: What is the thirteen months you are talking about? Each year has twelve months.

MR. GOLDSTEIN: When he wasn't at work aboard a ship.

MR. STEARNS: From May 1970 to June 7, 1971.

THE COURT: All right. Ask the question that way and we will understand it.

Q Doctor, you don't know the tone of his body, do you?

THE COURT: The tone of his body?

MR. GOLDSTEIN: The tone of his body.

Q You said something about his body tone?

A I am talking about his muscles.

Q Do you know the tone of his muscles in 1971?

A No, I didn't see him in 1971.

Q You don't know anything about him in 1971, do you?

A No.

Q You didn't even hear of him in 1971, did you?

A That is correct.

Q So when you answered that question, that was just a general answer to a general question, isn't that true, without any facts supporting your answer or not supporting it?

THE COURT: I don't know what you mean by that question, Counselor. You will have to do better than that.

Q Doctor, when you said that a man could develop a tenderness from heavy lifting if his body wasn't prepared for it, that doesn't mean anything concerning Mr. Porss necessarily, does it?

A Of course it does. I thought it was a very

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specific question. I heard that he wasn't working for thirteen months when I was sitting back there, and I presume his question was directed to that period of time.

Q Did you know what he was doing during the thirteen months?

He was not working as a seaman. I don't know what else he was doing but the question was if he had not been working for a period of time, and he didn't specify that, and if he started doing heavy lifting, could he get tenderness in his muscles. Of course.

As a matter of fact, you can go in your backyard and do a lot of lifting and you and I, or anybody else, could get sore muscles and the muscles would be tender.

Q And what would happen to them after two, three, four or five days?

A That all depends. Some of them may disappear in 24 hours, or several days, and then disappear, and it depends on the condition of the patient and also the severity of the strain imposed on the muscles.

Q Would you expect that it would last for two months?

THE COURT: What is that?

MR. STEARNS: I object to that. There is no testimony that it lasted for two months.

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THE COURT: I don't know what it means.

Sustained as to form.

Q Doctor, would you expect that tenderness such as you have indicated to come from your muscles not being toned, to last two months to the point where you would be declared unfit for duty for two months?

MR. STEARNS: Objection.

THE COURT: Overruled.

A That all depends on what the hospital records really show.

Was this tenderness observed for two months? I am not aware that I saw that note in the records.

THE COURT: Please don't ask questions.

Q He had a lumbosacral sprain for two months, Doctor?

A That was based primarily on subjective complaints.

The initial findings of tenderness were really made at the beginning. I am not aware that there was anything beyond that period. If there was, I would be very happy to change my answer.

Q But your answer is, Doctor, that anybody who hasn't been at work for thirteen months could get tenderness in his back and that that tenderness would last, oh, for any indefinite period until some time in the future?

A I really didn't say that. I used the garden example because I thought that just came to mind. I happen to be doing that right now.

If a patient gets exposed to a heavy lifting job that requires a lot of effort, if his spinal muscles are really not attuned to that very heavy type of work, he can strain his muscles and his ligaments and conceivably it could produce initial tenderness.

THE COURT: All right. I think we have had enough of that, Counselor.

Q And that tenderness might go away in 24 hours or a couple of days, or what have you?

A And it would be followed by a period of pain which is indefinite depending upon his tolerance to the pain and the other factors surrounding an examination of a patient at that given point.

Q And Doctor, you don't know that Mr. Porss was at rest and hadn't used his muscles or anything else for thirteen months? You don't know anything about him?

THE COURT: He said he didn't know what he did.

Q Isn't that true, Doctor?

A I answered that before.

Q All right.

Now Doctor, I notice that you rattled off these

qualifications of your very, very nicely.

THE COURT: Now wait a minute. You don't need to use those kinds of terms.

Q In a long sentence --

THE COURT: You don't need to say that. He is a physician.

Q Doctor, what percentage of your total practice is spent in testifying and in examining people on behalf of lawyers and insurance companies?

THE COURT: What part of his practice?

MR. GOLDSTEIN: Yes.

Q What percentage of your practice, Doctor?

A A very small percentage.

Q Doctor, isn't it true that you have what they call "downtown days and uptown days," and if you want, if somebody wants to have his client examined because the company has required to examine him, that he schedules an appointment for you on your downtown day if his office happens to be downtown?

A Who is "he"?

Q The attorney for the plaintiff, Doctor, where you examine all of the injured people.

A Nobody schedules my office appointments. Those are done by my secretary and not by myself.

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Q It is done by your secretary and not by yourself but your secretary schedules days for you to examine injured people on behalf of attorneys and insurance companies according to when your schedule sets you up as examining on your circuit uptown or your circuit downtown, isn't that true, Doctor?

MR. STEARNS: I object to the form and tone of the question.

THE COURT: Sustained. You are out of order on that one.

Q Would you say that it is unfair comment for me to say that your examinations on behalf of attorneys and insurance companies for the purpose of writing reports and testifying must take on 75 per cent of your total practice?

MR. STEARNS: Objection.

THE COURT: Sustained. He didn't say any such thing.

MR. GOLDSTEIN: I am asking him if it would be unfair for me to say it.

MR. STEARNS: Objection.

Q Well, Doctor, what is your answer?

THE COURT: All right, answer it, Doctor.

A I don't know what percentage. If you would like to know how much, I may hazard a guess and I will be

glad to give it to you. I am no t saying --

THE COURT: Don't guess. You may estimate.

A I really cannot say. I may use the word "substantial," you know. I think that would cover that, but I cannot --

Q You would say it was a substantial part of it?

A Yes.

Q Okay.

Doctor, you examined Mr. Porss the one and only time in your life some three and a half years after the accident, is that correct, sir?

A That is correct.

Q Now, Doctor, did you know that when you examined him on that day Mr. Porss had been declared fit for duty by the Public Health Service doctors?

THE COURT: Can you answer that question?

THE WITNESS: I can answer it but that is not going to be the answer. It is just the opposite.

A When I got this in our office, I was given the following information:

(Reading) Patient mad a total of three trips during 1972, 1973 and 1974. He has not been fit for duty since September 20th of 1974, which is roughly two and a half to three weeks before I examined him, so when I saw

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him. I was told he was made not fit for duty.

Q You were told he was not fit for duty?

MR. STEARNS: He had been made not fit for duty.

THE COURT: I don't know what you mean by "had been made not fit for duty."

THE WITNESS: The doctors at the various U. S. Public Health Service facilities where he was seen -- the last doctors that saw him on September 20, 1974 -- my information is that he was made not fit for duty since that date. Which doctors I have no recollection, your Honor. I don't know. But that is the information I got from the patient's attorney, or whoever else was in attendance.

THE COURT: All right.

Q Doctor, the kind of injury complained of by Mr. Porss is an intermittent thing, isn't that so? Pains come and go in a back condition, isn't that true, Doctor?

A To some extent that may be true but that is not the sequence. Usually when a patient hurts his back, the maximum pain that he will have is at the time of the injury, and then gradually it will subside.

Now, the period that you are asking me about is the period when he was tapering off, and there will be days when he is a little worse, like when there is inclement weather, and some days he is better, but it is a down trend

and there is no shooting up again of symptoms unless you have another episode of injury.

Q I am now talking about three and a half years after. At that point, Doctor, assuming that the condition still existed --

THE COURT: What point are you talking about?

MR. GOLDSTEIN: Three and a half years after the accident.

MR. STEARNS: I object.

THE COURT: Well, reframe your question, Counselor, so we will have it.

Q Well, Doctor, in October 1974 when you examined Mr. Porss, it was three years and some four months after the accident of June 1971, isn't that so?

A Yes.

Q Now, you would expect at that time that Mr. Porss would have what I would call good days and bad days; would that be customary, Doctor?

A No, not that long, not with a back sprain. It doesn't last that long.

Q Doctor --

THE COURT: Let him complete his answer, Counselor.

Q Doctor, I said assuming that Mr. Porss still had

the condition --

MR. STEARNS: Objection.

Q -- there would be good days and bad days. By that I mean, Doctor, that there would be periods of exacerbation, a period of remission, and that the pain or the degree of pain in any particular day would be a matter of perhaps yes, perhaps no.

MR. STEARNS: Objection.

THE COURT: Sustained as to form.

MR. GOLDSTEIN: This is cross-examination, Judge.

THE COURT: Yes, but that doesn't mean that you can do anything you want.

Q Doctor, can you give me a yes or no answer?

THE COURT: Ask your question. I have sustained the objection as to form.

MR. GOLDSTEIN: I am asking a new question, Judge.

THE COURT: All right, proceed.

MR. GOLDSTEIN: Thank you.

THE COURT: I didn't understand that you had gone to a new question. Go on with it then.

Q Doctor, isn't it true that a lumbosacral strain does have periods where there is more pain and periods where there is less pain? It isn't a steady pain, is it, Doctor?

A I thought I answered that question before.

THE COURT: Answer it again, please.

A At the beginning of the Injury he will have a steady pain at first right after the accident. Then, as he is beginning to get well, he will have periods where the pain is a little worse on one day, a little better on another day, but t'at's within the immediate period after the accident; certainly very mild on days, mayb weeks, maybe a few months, in a very severe case, but you are not going to get a muscle pain three and a half years later. I just can't justify that medically.

Q Doctor --

THE COURT: All right, he has answered your question.

Q --Doctor, when this man was discharged from the Marine Hospital in New Orleans some six days later, he was diagnosed as having an acute lumbosacral strain.

Now, Doctor --

A Excuse me. I'm sorry. I want to get oriented as to time.

That was right after the accident?

Q Six days after.

THE COURT: Do you want to let him have the record, Counselor? That's the best thing to do -- the

New Orleans record -- whatever exhibit that is.

MR. STEARNS: Here it is right here.

THE WITNESS: I have it now.

THE COURT: Now will you repeat your question?

Q What was the diagnosis at the time of discharge of Mr. Porss from the New Orleans Public Health Service Hospital?

A Acuse lumbosacral strain.

Q Now, Doctor, did that indicate to you -- what date was that?

A The discharge diagnosis was June 18, 1971.

Q That is ten days after the 8th, isn't that correct, Doctor?

A Yes.

Q And at that time he had the acute lumbosacral strain. Was that any indication to you that there was in fact something that did happen to Mr. Porss out of order, that is, that it wasn't simply a tightening of a muscle because of lack of tone of the muscles while he was doing customary work?

A No. The record only indicates that they noted an abnormality in the muscles of his lower back. It doesn't say from what cause. It just states that they noted that abnormality.

Q And of course they also stated the history that was given to them by the patient, isn't that true?

A Yes.

Q And that was taken into account when the ultimate diagnosis was made, isn't that true, Doctor? History is important, isn't it?

A I presume that the doctor took that history into consideration when he made his diagnosis.

Q History is an important thing, isn't it, Doctor?

A Yes.

Q And the complaints are important?

A Well, that is part of the history.

Q Now, Doctor, from what I gather, what you have testified to here today is on the one day, three and a half years after the accident, when you examined Mr. Porss in my office, you found that there were no objective findings that you could see; is that true?

A Or subjective complaints during the examination.

Q Or subjective complaints during the examination?

A I found that he was cured. I stated that.

Q And that's all?

A I examined the injury and that's the conclusion.

Q All right.

Now, you have no conclusion as to what his

condition was a month before that time, or two months before that time, or three months before, or any other time before the day that you examined him going back some three and a half years; isn't that true?

MR. STEARNS: Objection.

THE COURT: Well, answer it.

A Well, I do have an opinion inasmuch as I could rely on the hospital record submitted.

THE COURT: All right, there you are, Counselor.

Q Well, Doctor, you didn't have those hospital records when you examined Mr. Porss, did you?

A Well, I had them before I dictated this report so that whatever I said in that report is based upon my knowledge of what all the doctors in the hospital said.

Q That is right, and you made a report based on your examination of --

THE COURT: He said "plus the records," Counselor.

THE WITNESS: Plus the records.

Q Yes, plus the records.

A Of course.

Q And on some days those records showed that there was a lumbosacral strain and on some days it showed that he was fit for duty, isn't that so?

MR. STEARNS: Objection.

Q Isn't that so, Doctor?

THE COURT: Wait a minute. He objected. I will allow it.

Read the question, please.

(Record read.)

THE COURT: If you recall, without looking at the papers.

A Well, I would answer yes to that bearing in mind that the lumbosacral strain was made from subjective complaints and an objective finding of muscle tenderness, I believe, between the 12th and the 18th of June of 1971.

Beyond that period of time it is also my recollection that all the diagnoses referable to low back complaints really were based upon the complaint of pain offered by the patient without any objective clinical findings made by any doctor.

Q Doctor, you don't know what clinical findings were made, do you?

A They are in the record here.

Q Doctor --

THE COURT: Did you read this record of the New Orleans Hospital?

THE WITNESS: Yes.

Q Do you know the extent of the examinations given

to this man by those reports in those records?

A The record speaks for itself.

Q The record doesn't speak for itself.

THE COURT: Now wait. Don't argue.

Q The record --

THE COURT: Wait a minute, now. We are going to stop, and I am going to ask the reporter to read this question, and you are not to argue with this witness or with any other witness, nor is Mr. Stearns.

(Record read.)

Q Doctor, do you see any report of the extent of examinations given to this man on November 23, 1972?

MR. STEARNS: What do you mean by "extent of examination"?

--I object to the form of the question. What does that question mean?

THE COURT: Sustained. Look at the record, will you?

THE WITNESS: I don't have it here.

THE COURT: Let's end this business of asking questions when he doesn't even have the record before him. Now read the record, Mr. Reporter.

(Eecord read.)

Q Doctor, are you trying to tell us now, Doctor,

that what is --

MR. STEARNS: I object to the form of the question.

THE COURT: Sustained right away. You don't have to use that terminology.

Q Doctor, are you now telling us that what is in that record is the extent of the examination each and every time that Leroy Porss went to the Public Health Service Hospital?

A Yes, to the extent that all pertinent findings were recorded, and those that were not pertinent may have been left out.

If I cannot accept what the doctot put down here, then nobody knows what went on with with this patient.

If a doctor recorded a "could have," he certainly would record a pain. I mean, that's common sense.

Q Doctor, isn't it true that that record shows the results of testing but not the tests themselves?

A The results of tests are based upon clinical evaluations by the doctor, and therefore the result that the doctor mentions should be significant along with any objective findings that he makes.

Q That's correct, sir. And if you don't know the extent of the tests that were performed by the doctor,

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you can't make a proper evaluation of the patient's condition on any one day; you must simply go by the records as they exist, and thos e records, Doctor --

THE COURT: One question at a time.

Q Then those records --

THE COURT: Wait a minute.

Q -- lumbosacral strain --

THE COURT: One question at a time.

Stop right there. Split your questions. Don't throw two or three questions at him all at once.

MR. GOLDSTEIN: That was all one question.

THE COURT: If there is an objection as to form, the objection as to form, the objection is sustained.

MR. STEARNS: Objection.

Q As a result of those records --

THE COURT: Wait a minute.

Did you object?

MR. STEARNS: I objected, your Honor.

THE COURT: Sustained.

Q Doctor, as a result of those records, time after time, wasn't there listed there a lumbosacral strain?

A Well, I don't know whether it was listed time after time.

Q It was more than once, wasn't it, Doctor?

MR. STEARNS: Point it out to him.

A You will have to point it out to me.

Q Doctor, you said you read the records.

A I didn't memorize them. I am not a computer.

Q How many times did you see the words "lumbo-sacral strain," Doctor?

A I'm sure I saw them more than once but I do not know how many times, and I stated before, in respo2se to the Judge's question, that at the beginning, in June of 1971, at the New Orleans Hospital, there was mention of tenderness on the part cf the doctor. Now, that to me is pretty much of an objective finding, and when considered with the history that the patient gave the doctor, the doctor made a diagnosis of a lumbosacral strain, with which I agree.

Now, further on there are no objective signs, but if the diagnosis was repeated at subsequent times, it was based upon subjective complaints.

Q How do you know that?

MR. STEARNS: That is his opinion.

A There were no objective findings written down by a doctor. If a doctor is competent in one hospital record to put down objective findings, he cannot be incompetent when he doesn't put them down, so on the basis of complaints, he says, "lumbosacral strain."

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I may have said the same thing. It is no reflection on the doctor. He just had nothing else to put down.

Q You mean, Doctor, that you are now saying that the Public Health Service doctors just put down "lumbosacral strain," they take a man out of work and say that he is unfit to work on the basis of saying, "Oh, what the heck, I can put it down. I would just as soon put that down as put the other thing down"? Is that what you are telling us?

A It has happened many times.

Q Doctor, is that what you are telling us?

A I am trying to answer your question.

Q Well, I wish you would.

THE COURT: Then let him.

A It happens many times when a patient goes over to the United States Public Health Service Hospital and complains of back pain, they examine the patient, they see no objective clinical signs of any back injury, but on the basis of subjective complaints the doctors make the patient not fit for duty, and they say, "lumbosacral strain, or lumbosacral sprain," and it is accepted medical practice. It doesn't prove that diagnosis made by the doctor but they do that quite repeatedly, and I have seen many records from

the U. S. Public Health Service Hospital and it is a very routine thing that they do.

Q You say that on the basis of your examining for the people who are against the injured man, isn't that true?

MR. STEARNS: I object. I object.

THE COURT: Sustained.

Q That is the substantial part of your practice, isn't it, Doctor, to examine people who are injured and to report against them?

THE COURT: That is repetitious. The objection to that is sustained. That is repetitious.

Q Isn't that so, Doctor?

A Well, if you are trying to say to these people that I am dishonest, of course my answer should be quite obvious to you. There must be room in our society where a doctor can do a consultation and, even if you don't like the result, that you should accept it as being the only medically good result that can be obtained. Maybe I'm right. You should consider that possibility.

Q And maybe you are wrong doctor.

A Well, then you have to prove that.

Q Did you consider that possibility?

A I did a good examination and I feel that onthe basis of all the information in the hospital records I

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arrived at the only finding possible.

When I have a patient that moves his back completely and he has no pain, I don't know what other answer I can give except to say that he's recovered. The best proof of the pudding is the patient. It doesn't hurt him. What else do you want me to say? Am I partisan because I report the truth?

Q I have no complaint with what you found on that day that you examined him. My complaint, Doctor, is that you make the same finding three and a half years later without even having seen this man. Do you think that's fair?

A If you were a doctor --

MR. STEARNS: I want to note for the record that Mr. Goldstein is again shouting, as he has been throughout this trial.

THE COURT: Yes. Stop it. Don't argue with the witness.

Q Doctor, do you think it's fair for a doctor to get up on the stand without seeing a man for three and a half years and look at records time after time of examinations in a Public Health Service Hospital records where doctors have said, time after time, that the man has a lumbosacral strain, and then pooh-pooh it as though saying that doctors

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don't know what they are talking about, they do it all the time, without any rhyme or reason? Is that what you are telling us?

THE COURT: Now stop that.

MR. STEARNS: Objection.

THE COURT: Sustained. Stop shouting at the witness. That is no way to conduct a cross-examination.

MR. STEARNS: Again for the record, Mr. Goldstein was shouting throughout.

THE COURT: Yes. Stop your shouting.

Q Doctor, do you expect this jury to believe that you can come aboard here, after three and a half years of not seeing this man, and make a statement, a valued estimate of the man's condition for that three and a half-year period, without ever seeing him, when all of the doctors who have seen him time after time have made him unfit for duty with a lumbosacral strain?

MR. STEARS: Objection.

THE COURT: Sustained. That is not a relevant question at all.

Q Doctor, did you ever see Mr. Porss for three and a half years after the accident until the one time in October?

A I saw him one time, and also today.

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THE COURT: He has told you that. It is already answered.

Q And Doctor, for the remainder of that examination, for the report that you have given us today, such as it is, you have read from --

THE COURT: Strike out "such as it is".

Q -- from the Public Health Service Hospital records, who have treated him for about three and a half years, for that three and a half-year period, isn't that true?

A I don't understand what you are saying in the way of a question. I'm sorry.

Q Well, Doctor you rely upon the Public Health Service reports of the treatment given to Mr. Porss for three and a half years before you examined him?

A I used all the medical records of the United States Public Health Service Hospital as background information to help me evaluate the patient when I saw him.

Now, when I saw this patient, he had nothing. You can't squeeze water out of a rock.

If I saw him in June of 1971, I assure you my examination would have been different.

There is nothing personal in this. Please don't ever use that --

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Q And your findings would have been different, perhaps?

A In '71 perhaps I would have found the tenderness and the same back pain that the other doctors did. I'm sure that your own doctor found that. But don't expect me to find muscle tenderness and spasm, and evidence of a lumbosacral strain three and a half years later because that doesn't happen in medicine unless the patient gets hurt again. That's medicine.

Q Doctor, my request of you was to tell us what Mr. Porss had before you joined him, and you came on with a statement that the hospitals mark a man with a lumbosacral strain whether he has it or not.

A I didn't say that.

MR. STEARNS: Objection to the form of the question.

THE COURT: Yes. Sustained. That's a speech and an argument. I sustain the objection.

Please, Mr. Goldstein, proceed.

Q To finish this up, Doctor, your report is only of the one day that you saw him, is that correct?

A Right.

Q Everything that you told this jury concerns the day of October 7, 1974 when you examined him, is that correct?

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A That's part of it. I also said other things based upon this record that you asked me about.

THE COURT: He can't answer yes to that, Counselor.

Q Doctor, that's exactly where we are getting into difficult.

MR. STEARNS: Objection.

THE COURT: That is not a question. You are arguing.

Q Are you saying that anything that is in the hospital record on the basis of doctors examining Mr. P[illegible]s for the three and a half-year period time after time are incorrect?

MR. STEARNS: Objection, objection, objection.

THE COURT: Sustained.

MR. GOLDSTEIN: What's wrong with that question, Judge?

MR. STEARNS: It is pointless.

THE COURT: The form of it. He is saying everything.

Q Doctor, are you saying that anything in that record is inaccurate?

A I haven't made any comment one way or another about inaccuracies. I only made one statement which I

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thought was so clear in this record, that at the beginning the doctors found an objective sign of tenderness in the muscle, and after that they did not do any more, and they made their diagnosis based upon subjective complaints.

THE COURT: I think you have answered it, Doctor.

Q And you don't disagree with their diagnoses, do you, Doctor? You have no basis to disagree with it, do you?

THE COURT: He has already stated his differences.

Q Doctor, do you have any basis in point of fact for disagreeing with the diagnoses that were made by the examining physicians in the Public Health Service Hospital?

MR. STEARNS: Objection.

THE COURT: I suppose it has already been answered, Counselor. I think he has explained his position fully.

MR. GOLDSTEIN: May I have an answer to the question?

THE COURT: No. The objection is sustained.

MR. GOLDSTIEN: All right, Doctor. No further questions.

THE COURT: Any redirect?

MR. STEARNS: Just one question.

bs50 Lodico-redirect

REDIRECT EXAMINATION

BY MR. STEARNS:

Q Doctor, just to illustrate, perhaps you did look at the records. They were given to you for your review, is that right?

A Yes.

Q You don't know what the condition of Mr. Porss was on August 6, for example, 1971, do you?

A Of course not.

Q But do you feel it proper for you to refer to a report of an orthopedist who made an examination on that day?

A Well, that's what I did.

Q In fact, you did exactly that.

Now, will you just look at the orthopedic examination and read that?

THE COURT: On what date? The 6th of August?

MR. STEARNS: August 6, 1971.

A Orthopedic examination:

Patient walking with the aid of two canes but he does not appear to be in any discomfort.

MR. GOLDSTEIN: If your Honor please, can Dr. Lodico read that to himself? That's been read to the jury already.

bs51 Lodico-redirect

THE COURT: No. He is asked to read it now.

MR. GOLDSTEIN: It had been read already.

THE COURT: Well, all right, let it be read again.

MR. GOLDSTEIN: Well, then are we going to read all of the reports that are in evidence?

THE COURT: No. This is one particular thing. Now, you will have to limit your redirect questions to that.

MR. STEARNS: To this report?

MR. GOLDSTEIN: Does Dr. Lodico have to read it aloud in order to answer questions about it?

THE COURT: That remains to be seen as to each question, Counselor. Your objections are overruled.

A (Reading.)

He moves around, dresses and undresses, and gets on and off the examining table with great agility.

THE COURT: All right, that's enough.

Q Now, is that significant, Doctor?

A Of course.

Q Do you feel that you are entitled to rely on that piece of news from an orthopedic consultant, or on that information?

A Well, this is what this orthopedic consultant found when he did the examination on August 6 of 1971.

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bs52 Lodico-redirect

Q On August 6 of 1971 --

THE COURT: All right, get on to some other subject.

Q This, Doctor, orthopedic consultant found the man to be fit for duty and said he had a normal back, isn't that right?

A Well, to quote, he said "The patient has recovered from the low back strain sustained two months ago. No orthopedic condition is present at this time. Patient is fit for duty."

MR. STEARNS:

RECROSS EXAMINATION

BY MR. GOLDSTEIN:

Q And Doctor, in November of 1971 when he was marked not fit for duty for a lumbosacral strain, you would accept that in the same vein, isn't that so?

MR. STEARNS: I object to "In the same vein."

THE COURT: Sustained in that form. I don't know what "the same vein" means.

Q In the same way that you accepted Dr. Gianelli's report of August 6, 1971 you would accept every other report of every other treating physician, or examining physician, who saw Mr. Porss in the Public Health Service Hospital over a period extending some three and a half years?

MR. STEARNS: Objection.

Q Isn't that true, Doctor?

THE COURT: Sustained. There is no reason why the determinations of the Public Health Hospital people is determinative at all. I sustain the objection. That is an implication from your question.

FURTHER REDIRECT EXAMINATION

BY MR. STEARNS:

Q Referring now to the --

THE COURT: I wish you would complete your redirect, Counselor.

MR. STEARNS: This is absolutely the last thing, your Honor.

Q November 23rd, 1971 there was a disposition, "Disp. NF"; is that righ t?

A Yes.

Q At that time Mr. Porss was complaining of a cough, was he not?

A Yes.

THE COURT: You have gone all over that, Counselor.

Q And he still has persistent low back pain, is that right?

THE COURT: All the record is in.

bs54 Lodico-redirect

Q Is that an example of a designation of duty status based on complaints?

A That's what I said before and that's what I say now.

FURTHER RECROSS EXAMINATION

BY MR. GOLDSTEIN:

Q And a designation of duty status based upon examination too, isn't it, Doctor?

A Well, if there were objective findings, the doctor would have put them down. The fact that he didn't put them down shows that he did it on subjective complaints and he was made not fit on two things:

No. 1, the cough secondary to his bronchitis, and the other one is the lumbosacral strain.

Q Doctor, where does it show in that --

THE COURT: Wait. It's not recross yet. You are interfering with Mr. Stearns.

Are you through?

MR. GOLDSTEIN: He is finished.

THE COURT: Now recross, a limited amount.

Q Doctor, doesn't --

MR. STEARNS: I object to questioning the witness from a seated position.

Q You look at that report and you are now telling

us that that report doesn't show any objective findings, is that true?

A That's exactly what I said.

Q Does it show any subjective findings?

A No subjective findings but complaints.

"Patient stated persistent low back pain." That is a subjective complaint.

Q Does that one report in that little area on that one page show any examination at all?

A The report doesn't show but it must be based upon an examination which was devoid of objective findings.

Q How do you know that, Doctor?

A Because all doctors do it the say way.

Q All doctors do it the same way? Is that what you are telling us? All doctors?

A Have you ever seen a patient go to a doctor's office --

THE COURT: Don't ask him questions. He is not on the stand and he is not under oath.

Q Doctor, why don't you just come right out and admit that you don't want to say that the man had a lumbo-sacral strain?

MR. STEARNS: Objection.

Q You take the one --

bs56 Lodico-recross

THE COURT: Sustained.

MR. GOLDSTEIN: May I finish the question?

THE COURT: Yes.

Q You take the one report of August 6, 1971 and you wave that up, and you say "This is the one I believe," but you refuse to believe anything else that's in that record, the time after time that the man was given a lumbosacral strain, not fit for duty status; isn't that so, Doctor?

MR. STEARNS: Objection.

THE COURT: Sustained.

MR. STEARNS: Once again, Mr. Goldstein was shouting.

MR. GOLDSTEIN: Absolutely. I am disgusted by this.

THE COURT: Let's excuse the witness then.

(Witness excused.)

THE COURT: Now, the plaintiff has rested. Does the defendant rest?

MR. STEARNS: yes, sir.

THE COURT: Any rebuttal?

MR. STEARNS: There is one other thing.

THE COURT: Well, get it in, Counselor, please.

MR. STEARNS: Mr. Goldstein called for a state-

bs57

ment of George Schmidt which I did not have yesterday. I now have it. I put it in front of Mr. Goldstein.

THE COURT: There it is. Let the record show that Mr. Stearns has handed to Mr. Goldstein the statement of Mr. George Schmidt, is that right?

MR. STEARNS: That's correct.

MR. GOLDSTEIN: Thank you very much.

THE COURT: Now I will ask again, has the plaintiff rested?

MR. GOLDSTEIN: I think, Judge, that there are a couple of stipulations that we should get into the record.

THE COURT: Put out anything else that is appropriate. Let's complete this case this afternoon. It's nearly half-past four now.

I may say to the jury at this time that the Court will not sit tomorrow, and you are excused from coming to the Court House tomorrow, and your next visit will be next Monday, the same place, at a little before 10 o'clock in the morning. Please continue to heed --

MR. GOLDSTEIN: I assume we are going to finish the case on Monday, Judge?

THE COURT: We will do the best we can. Part of it will depend upon factors which are effected by what the attorneys do and how long they want to sum up. I will

bs58

speak to them about that now.

The jury will be available, the Court will be available, and I hope that we will finish the case. It depends on circumstances.

Now, you may go and, as I say, come back Monday a little before 10 o'clock.

(The jury left the courtroom. Time noted 4.15 p.m.)

THE COURT: I am informed, Mr. Goldstein, that your requests were not handed into my clerk until this afternoon.

MR. GOLDSTEIN: That is correct, sir.

THE COURT: I think the rule provides that they are supposed to be filed one day -- is that right, Mr. Page -- before the case starts. You have been hounded almost every day to get your requests in. Consequently, I shall not rule this afternoon on your requests.

How about the defendant's requests?

MR. PAGE: I have those, Judge.

THE COURT: I will rule on those. His requests were in at an appropriate time. Before that, however, I want to have the proposed special verdict here, the origrinal, marked by the clerk as a Court exhibit.

(Court Exhibit 1 marked.)

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THE COURT: I will ask my clerk to pass out copies to counsel.

Now, if there is any substantial error here, please speak of it.

MR. STEARNS: Your Honor, I respectfully say that there is substantial error here.

THE COURT: Which one is it?

MR. STEARNS: Beginning with No. 1.

THE COURT: This is the negligence --

MR. STEARNS: The first question to the jury should be whether or not there was an accident. The first instruction to the jury should be that they must believe that the accident described by plaintiff occurred.

THE COURT: Well, that is an instruction. That is not a special verdict.

MR. STEARNS: Well, the statement indicates --

THE COURT: Will you please tell me what you would have me say in Question No. 1 instead of what I have said?

MR. STEARNS: Let me have a moment, please.

(Pause.)

MR. STEARNS: I would ask respectfully that the first question be that the jury be asked to determine whether or not the plaintiff had the accident that he

bs60

claimed on the ship on June 8, 1971.

THE COURT: I am not going to do it that way, Counsellor.

No. 2. Is there anything there by you?

MR. STEARNS: No, there is nothing objectionable about No. 2.

THE COURT: 3.

MR. STEARNS: 3 I don't believe is a factor in the case. I don't believe that is an issue in the case. He didn't get hurt moving the butterworthing machinery.

THE COURT: I don't know what it is. It has been a muddled-up situation.

MR. STEARNS: Your Honor, may I respectfully prepare, at least, suggested questions?

THE COURT: Yes, you may, if you will get them into my office by tomorrow noon.

MR. STEARNS: By tomorrow noon. And I would reserve all my --

THE COURT: All right. Any objections from you, Mr. Goldstein?

MR. GOLDSTEIN: Yes, sir. I have no argument at all, Judge, with the questions as they are. There may be some minor points of change of language but that doesn't concern me. What does bother me, Judge, is that I see

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nothing here concerning the negligence of the plaintiff's co-workers.

THE COURT: That is a matter for the charge, Counselor.

MR. GOLDSTEIN: Judge, there is nothing here in the questions that tells this jury that they are supposed to make a determination on negligence on the basis of the failure of the co-workers to properly perform their duties.

THE COURT: That will be in the charge, I said. I am not going to insert a charge in these questions.

MR. STEARNS: It is right in No. 2.

"Has plaintiff proved by a fair preponderance of the credible evidence that the defendant was negligent because the other crew member with whom plaintiff was working in removing the butterworthing equipment negligently left go of the hose?"

Now, this is typical of Mr. Goldstein's performance throughout this trial.

THE COURT: Anything else, Mr. [illegible]istein? We are going home soon.

MR. GOLDSTEIN: No, Judge.

THE COURT: At least I am.

All right. Now, I will take the -- you have

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the requests of defense counsel?

MR. PAGE: Yes, Judge.

THE COURT: Do you have the defendant's requests?

MR. GOLDSTEIN: No, I do not, sir.

THE COURT: Haven't you given Mr. Goldstein a copy, Mr. Stearns?

MR. GOLDSTEIN: I have never had it, Judge.

MR. STEARNS: I do not know but I believe not.

THE COURT: Well, give it to him now, then.

MR. STEARNS: Can I have his now?

MR. GOLDSTEIN: I can give you mine as soon as the Judge says that he will examine them and look at them.

THE COURT: I am not going to do it tonight.

MR. GOLDSTEIN: I understand that your Honor will do it Monday then?

THE COURT: I have to before you start to sum up.

MR. GOLDSTEIN: Then here is a copy of mine (handing).

THE COURT: Now do you have a copy?

MR. GOLDSTEIN: No, Judge, I still do not have a copy of his.

MR. STEARNS: I can go down to the 17th floor and make copies and give him a copy.

THE COURT: I don't want to wait while you fuss

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around making copies. I don't know why counsel can't make enough copies to go to the adversary. That is somewhat incredible. You can write this down and then you can get your copies.

MR. GOLDSTEIN: Judge, your clerk has been kind enough to give me your copy.

THE COURT: I don't have the defendant's requests here, Counselor.

All right, I will read my rulings on the defendant's requests. Now get your paper and pencil out for this. Then you can compare it with the copy.

No. 1 is refused except as charged.

No. 2 is granted as charged.

No. 3 is granted as charged.

No. 4 is granted as charged.

No. 5 is received except as charged.

No. 6 is granted as charged.

No. 7 is refused except as charged.

No. 8 is refused except as charged.

No. 9 is granted as charged.

No. 10 is granted as charged.

No. 11 is refused except as charged.

No. 12 is granted as charged.

No. 13 is granted as charged.

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No. 14 is maintenance and cure, which is refused now.

No. 15 is granted as charged.

Now, the follow are refused as to maintenance and cure:

16, 17, 18, 19, and 20 are refused.

21 is MMC, meaning maintenance and cure.

22 is refused except as charged.

I think that's all of them now.

Now, are there any exceptions?

First Mr. Stearns.

MR. STEARNS: Well, your Honor, you are ahead of me because I am going too slow.

THE COURT: Well, take your time.

MR. STEARNS: Thank you.

THE COURT: I will wait a little while.

MR. STEARNS: Your Honor, for example, No. 5 is going to be refused except as charged but --

THE COURT: That's what I said, didn't I?

MR. STEARNS: Yes, you did.

Now, I except to this, and I except, of course, to all the refusals to charge except that I don't specifically know -- I mean, in an attempt to aid the Court as best I can here, specifically, the Court referring to the

bs65

language, the equipment, and in this case the number of men working was reasonably fit to permit plaintiff to work where he was in reasonable safety --

THE COURT: I don't know what you mean. 5 is not granted as charged. It is refused except as charged. Certain parts of it are --

MR. STEARNS: What will not be charged. What part will not be charged?

THE COURT: You will find out when you get the charge. You have a right to except then to anything that is improper in your opinion but not to make any more requests.

MR. STEARNS: Well, the request is for a charge in the form presented, including, of course, the second aspect of it, the consideration of the contract in force.

THE COURT: What is that about a contract?

MR. STEARNS: The second part of this, or the second aspect, in determining whether the number of men assigned to the butterworthing operation was sufficient, you may consider the contract in force between plaintiff --

THE COURT: Is there anything wrong with that?

MR. STEARNS: No.

THE COURT: Then all right, I will going to charge that.

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MR. STEARNS: Then I think the Waldron case is fairly well stated in the beginning portion of No. 5.

And over to No. 7 --

THE COURT: And 7 I said is refused except as charged.

MR. STEARNS: And I have nothing to add to the --

THE COURT: Well, obviously it is a common charge that if the injuries were caused solely by his own negligence, that is, that the defendant is so --

MR. STEARNS: Your Honor, may I interrupt? I need to make my motions if the plaintiff is now finished.

THE COURT: Well, let's wait until we get this done. I haven't precluded you from making your motions. I will take your motions at the end of the case, of course.

All right, do you have anything to say about the rulings? Say so now, if you can.

MR. GOLDSTEIN: Judge, do I have the right to object to some of the things that were granted?

THE COURT: Yes. Do you want to do it now or do you want time to do it?

MR. GOLDSTEIN: I object to your Hono r's ruling on Question No. 4.

THE COURT: Any others?

MR. GOLDSTEIN: May I go on to them one by one?

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THE COURT: I will take them one by one but tell me all of them.

MR. GOLDSTEIN: No. 4.

THE COURT: What others?

MR. GOLDSTEIN: I have No. 6 that I object to.

THE COURT: Any others?

MR. GOLDSTEIN: That is as far as I have read so far.

THE COURT: Well, read the rest of it so we can finish this job up.

MR. STEARNS: Your Honor, I think it would be appropriate -- I have a motion which I am going to try to make --

THE COURT: I will let you put it on the record but let's finish this little thing up first.

MR. STEARNS: Do you want me to wait?

THE COURT: Yes. That's what I indicated. If there are any others, you can tell me after the motion.

Now, what is the motion?

MR. STEARNS: Your Honor, of course we move at this time for a directed verdict on all the issues rasied by plaintiff's complaint on the ground that the fair preponderance of the evidence requires a judgment for the

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defendant.

Now, specifically -- and I would refer to the specific interrogatories -- the claim of the plaintiff as it has been presented appears to be in two forms:

One, the so-called Waldron cause of action for insufficient njmber of people to carry out the operation.

Now, I think this has been disproved by plaintiff's testimony itself, and I think we have to refer to the facts here to properly understand this.

Of course, the butterworth plate is straddled by the so-called middleman who, in this case was Schmidt. Mr. Porss is on either his right or his left side handling a hose. Somebody is on the other side of Schmidt with a line.

Now, there is a suggestion in the testimony that there should have been a fourth man, and the further suggestion is present --

THE COURT: Isn't it a question of fact for the jury?

MR. STEARNS: No, sir, it is not. I believe I can demonstrate that it is not.

The fourth man's role suggested in this record is to stand behind Porss holding the hose and to flick the line out of Porss' way, so perhaps he might not stumble

on it.

Now, that's the only testimony that has been presented by anybody about the role of the fourth man, to move the line out of the way. And of course, assuming a fourth man was required, or was proper, and it was negligent not to have a fourth man, this negligence, of course, because of the manner of the accident alleged, could not be a proximate cause. In other words, he did not stumble going backwards with the hose. He did not stagger or trip over a hose that had been left improperly behind him underfoot because of the absence of a fourth man. So the fourth man's role is irrelevant to plaintiff's case for liability. The whole Waldron cause of action is fatally defective.

THE COURT: I wish I could agree with you but I can't, and I think there is enough to go to the jury, and I shall have to deny that motion for a directed verdict on the insufficiency matter.

MR. STEARNS: As I say respectfully, your Honor, the only case here is for Mr. Goldstein --

THE COURT: Any other motion? Make your motion.

MR. STEARNS: Yes. My other motion, of course, is, as I stated before, to dismiss the case in its entirety, the negligence case, on the ground that there is

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no proof of any negligence either in the Waldron context or in the context of there being adequate proof for this jury that the letting go was negligence.

THE COURT: There may be substantial doubt about it but I can't say that there is no evidence, and I will have to deny your motion.

MR. STEARNS: As far as the medical matters and the damges are concerned, I heard no testimony from Dr. Seaman of any, connecting any period of disability to anything that he found on either of his two examinations.

THE COURT: You mean as to the lost wages?

MR. STEARNS: Lost wages, particularly lost future wages, wages since April 14, 1972. I didn't hear that testimony.

THE COURT: He testified as to future conditions, I suppose, referring to pain, suffering and disability, perhaps, but it was rather vague, that's true.

MR. STEARNS: And there is another thing. During cross-examination Mr. Goldstein said, "I have no quarrel with your findings on October 7, 1974."

He said that to Dr. Lodico. That is an admission, as far as I'm concerned, I think, that there is no claim of permanent injury beyond any doubt.

MR. GOLDSTEIN: Who said that?

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MR. STEARNS: You said that.

MR. GOLDSTEIN: I did not. I said --

MR. STEARNS: You said, "I have no quarrel with your findings on that date."

MR. GOLDSTEIN: Right.

MR. STEARNS: You agree then?

MR. GOLDSTEIN: That on that day --

MR. STEARNS: He was cured on that date.

MR. GOLDSTEIN: No. I didn't say he was cured.

MR. STEARNS: That was your statement.

THE COURT: He did say that he could testify with reasonable certainty. That is something else again. You have all of these reports, some of the reports revealing other causes, other difficulties prior and perhaps subsequent, physical difficulties, and there may be a very substantial question about anything in the future. There may be substantial question about the parts or the areas, that is, the alleged past lost wages, and I wish each attorney would, by Monday morning, turn in to me a written statement from the plaintiff as to what period he says there was an inability to work, and the computed amount of alleged loss for that period.

Do you understand me, Mr. Goldstein?

MR. GOLDSTEIN: Yes, Judge. We had made a

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list yesterday which I can't locate now and --

THE COURT: Well, locate it and het it to me by Monday morning.

MR. GOLDSTEIN: It is a list of all o f the plaintiff's work record from 19 --

THE COURT: That's not what I want. I want your claims as to the period when you say the proof shows he was unable to work and lost wages for that period. That's all. It's simple enough.

MR. GOLDSTEIN: All right, Judge.

THE COURT: And give a copy to your adversary.

MR. STEARNS: Your Honor, my major legal argument now, and I think it's a good one, is that the Waldron cause of action must fail because of proximate caustion to the alleged accident.

THE COURT: When will you submit? Tomorrow?

MR. STEARNS: Certainly by tomorrow.

THE COURT: Tomorrow by 2 o'clock.

MR. STEARNS: All right, your Honor.

MR. GOLDSTEIN: Will I get a copy of it?

MR. STEARNS: Sure.

THE COURT: Yes, I direct that he serve you with a copy. I direct that if there is an answering memorandum, you give me a copy and give your adversary a copy.

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Now, is there anything else?

MR. GOLDSTEIN: Will your Honor bear with me for just a moment? I am looking for that listing.

MR. STEARNS: That listing wouldn't supply the information that the Judge seeks.

MR. GOLDSTEIN: No, but it is something that is in the case, and I wanted to put it on the record because it will clear us up for Monday so that we can get right on with this business on Monday. This is just one of those things that is hanging around.

THE COURT: Well, it is hanging around for a long time, Counselor. This is the fourth day of this trial.

MR. GOLDSTEIN: Judge, I'm sorry, I can't seem to locate it, and I don't know why.

THE COURT: It doesn't fill the purpose anyway even if you find it.

Now, I want to know how much time you want, Mr. Stearns, for your summation.

MR. STEARNS: One hour, your Honor.

THE COURT: How much time do you want, Mr. Goldstein? Is that enough for you?

MR. GOLDSTEIN: I'm not quite sure, Judge.

THE COURT: Well, you answer me now. I will

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pass on it if you do n't know, and I will assume that an hour is enough for you.

MR. GOLDSTEIN: I would ask for an hour and a half.

THE COURT: No. I think an hour is enough for you. Make it an hour.

MR. GOLDSTEIN: Will your Honor be flexible on that hour?

THE COURT: Well, I won't cut you down at the exact minute, no.

MR. GOLDSTEIN: Okay.

THE COURT: But I m not going to take much time with this. You have the last chance here. He can't come back on rebuttal.

MR. GOLDSTEIN: Fine, Judge.

Your Honor has to appreciate, though, that I have to discuss damages in terms of money.

THE COURT: So does he.

MR. GOLDSTEIN: No, Judge, he doesn't really. All he really has to do is talk about negligence or the lack of negligence.

MR. STEARNS: Thank you for telling me what I am going to have to do.

MR. GOLDSTEIN: And after that his job is almost

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done.

THE COURT: Well, you may be a little surprised. I don't know.

MR. GOLDSTEIN: Conceivably. I have been surprised before, Judge.

THE COURT: I think you might be surprised on that one.

(Adjourned to Monday, April 14, 1975, at 10 o'clock a.m.)

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* * * * * * * * *

In this case, is the credibility of Mr. Porss, because he is saying an event happened. The event is an improbable event. His explanation of how it happened or why it happened is absolutely absent. The normal human reaction, and the event happened, is absent. An accurate description in the report of the accident is absent.

The motive to misrepresent the accident is clear. You must pay attention to the question of credibility. If Mr. Porss would lie about not having had an accident on the LONGVIEW VICTORY, if he were to lie by saying, "This is where the butterworth machine fits on to; I don't see it in the picture," if he were to lie when using the chance to impress the doctor, wouldn't he lie to say that this accident happened so that he might make some money from it?

Thank you very much.

EBP

THE COURT: Now, Mr. Goldstein, for the plaintiff.

MR. GOLDSTEIN: Thank you, your Honor.

Good morning, ladies and gentlemen. We have had a very, very trying week. You know that it has not been a quiet week; it has not been a week that you would normally expect to find in a court house, but you know also that every man is entitled to an attorney to help him and to protect him. That is the right of every one of us, both you, me and Mr. Porss, and if I felt at any time -- and I did, and you know it -- that in some way the matter was not being handled evenhandedly, giving the plaintiff --

THE COURT: You may disregard that, members of the jury, and you will continue, Mr. Goldstein, without such allusions.

MR. GOLDSTEIN: Then you know it is my duty to act as I see fit for the best purposes of my client, and you would want the same.

Now, if I have in any way offended anybody while I strove, during the course of the week, to protect Mr. Porss' rights, for that I am sorry, because you should not have had to be put to that burden and to see what went on this last week. However, these are the things that existed.

You have your opinions by this time about this trial, and there is very, very little that I can say to you

EBP 2

in terms of the way the case was tried that will --

THE COURT: You may disregard that. Please go on with your argument on this summation.

MR. GOLDSTEIN: Very well.

Let us talk about Mr. Porss. Mr. Porss, so Mr. Stearns would have you believe, decides to defraud the shipping company, and he says that Mr. Porss created -- creates -- out of his own mind an accident.

Now, if I were creating an accident for which I sought money, I wouldn't create an accident that occurred in front of two or three people, who would be testifying against me. I would create an accident whereby perhaps, as I walk along the deck alone, late at night, I might slip on some oil on the deck without any witnesses, go over to the first mate or to my superior officer and say, "Listen, Joe, I just slipped on the deck." "Where did it happen, Mr. Porss?" "Oh, it happened all the way out there, where nobody else was at the time."

And then, of course, the situation would continue when hewould ultimately go before doctors in the Public Health Service.

But, no. Mr. Stearns would have you believe that Mr. Porss is so shrewd, so shrewd that he wanted to defraud the shipping company and create this thing out of his own

EBP 3

imagination, and, on the other hand, he is so dumb that he tells you that the witnesses were all there, all the witnesses who would testify against him.

Of course, you have to decide whether you think that Mr. Porss, on the other hand, was shrewd enough to carry this thing off and never be caught until this time and so dumb that he did it in front of three witnesses.

Okay.

I suggest to you that this accident happened. I suggest to you that the shipping company knew that it happened, and I suggest to you that the proof is in the record.

Do you remember that we talked about the report of M.. Antoniou, and that was marked as an exhibit, and it is Defendant's Exhibit E, if you remember, and remember we talked about the date that the statement was taken, and in the upper left hand corner you see, "Statement taken" above a word "On the Overseas Aleutian" on 6/18/71, some ten days after the accident?

✳ And do you recall there was a statement by Mr. Wherrity, which I wasn't allowed to get in but which you know was prepared by --

MR. STEARNS: I object.

THE COURT: You will disregard that. Only the admitted evidence is to be considered by you.

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Mr. Goldstein, you will not refer to Wherrity's statement, which was not admitted.

MR. GOLDSTEIN: I am not talking about referring to it. I am not talking about reading it. I am talking about the fact that there is such a statement, and to that I can refer, because that is in the answers to the interrogatories.

THE COURT: I instruct the jury not to take any notice of this statement.

Now, you go ahead.

MR. GOLDSTEIN: The statement is there. I cannot read it to you. I cannot get it in. I wanted to. I cannot.

MR. STEARNS: Objection, your Honor, for the record of this trial. This is an absolutely impudent disregard of the Court's rules.

THE COURT: The Court rules that there may be an appeal of the Court's rulings, but at this time those rulings must bind the parties, and they bind you.

MR. GOLDSTEIN: So that there should be no question about it, there will be an appeal.

THE COURT: Disregard that.

That is absolutely out of order, counsel. You proceed and abstain from these side remarks, so to speak.

MR. GOLDSTEIN: So that we talk about what the

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defendant did, and I show you that the defendant, by the time ten days had gone by, had in fact investigated the case, had in fact obtained this statement from Mr. Antoniou, taken some tendays after the accident.

Now, Mr. Stearns says that Mr. Porss never reported the accident, and of course you know that Mr. Antoniou testified in his deposition, under oath, that Mr. Porss told him about it at nine-thirty that night, when Mr. Porss -- when he said he went over to Mr. Porss and wanted Mr. Porss to become the center man in this thing, and Mr. Porss, "My back hurts me."

So Mr. Antoniou knew at that time, so that there was a report.

And the next day, when Mr. Porss first realized how bad this situation had become and that he couldn't get out of bed, he then reported it to the first mate, who was the medical officer on board the ship. So that when you talk about Mr. Porss not reporting the accident, it is simply not so. He reported the accident to his superior officer at the time of the job. He reported the accident, or, in fact, he reported that his back hurt, and he couldn't work properly in that center position, and he reported when he found out how bad the situation was, the next day he reported to the first officer for medical treatment, and he was treated

EBP 6

medically aboard the ship.

You remember he said -- and Mr. Stearns never brought in anything against it -- he said that he was given both analgesics, pain killers, and he was given some ointment to rub in, and he did. And you remember Mr. Porss was off duty from that time on -- that's the morning of the 9th -- until he got off the ship, on the 11th, when the ship reached New Orleans.

Now, what is unusual about that situation? Where can Mr. Stearns point and say that Mr. Porss was trying to hide what happened to him? As you heard him say, he said that Mr. Porss was trying to hide this thing until he got off the ship. Well, he wasn't. He reported it to Mr. Antoniou right at the time. He reported it to the chief mate the morning after. He underwent medical treatment on the ship all of that time until he finally got off the ship, and then, when he got into the hospital in New Orleans, he went right over to the doctor and told him that, too. And it's the same story.

Now, if you want to talk about what an admitting person in a hospital puts down in a hospital record, I have no objection. If Mr. Porss had said, "Listen: in April of this year, while I was in a rowboat I fell down and I hurt myself," and then they come in and they say, "Listen,

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this is what Mr. Porss told the admitting doctor, that the accident didn't happen on June 8th, 1971; it happened in April; that it didn't happen on the Overseas Aleutian; and he fell down not while doing a Butterworthing operation", then I can say, "Hey, you've got a right to think about this thing."

But what did Mr. Porss tell them? Every day, not only in New Orleans but in New York, he told them that the accident happened on June 8, 1971 aboard the Overseas Aleutian while he was working with the hose, and whether you call it pulling or towing or anything else, this is subject to what these admitting people wrote down.

I haven't got the slightest idea of how much information or experience or knowledge they have about these things, and Mr. Porss doesn't know, because he doesn't know what they wrote down. They don't ask him, "Say, is this exactly what you say the story is?" He tells them, and they write it down, and ultimately, four years later, you hear what they wrote down.

Now, all I can suggest to you -- and you must take this on your own experience, because I can't tell you, and Mr. Stearns can't tell you and neither can the Judge tell you, by the way. You have to decide whether or not Mr. Porss told substantially what happened, told all of these various admitting people in the hospital what happened to him

EBP 8

substantially, and if you find that he did substantially tell what happened to him, that is, not about the accident, because they didn't care about the accident. They were doctors. They wanted to know in what way was he hurt. Why it happened or anything else -- that's not their purpose. They couldn't care less. They wanted to know, "How did you get hurt?"

And he tells them, "I was working with the hose. I was pulled, and that's how I got hurt," and he mentioned all of the details substantially, corroborating everything he said aboard the ship. That's what you have to piece together.

Now let me show you what else you have to piece together. Mr. Porss suggested that the blame for this is on two people plus one person more. He suggests, number one, that Mr. Antoniou, who is his superior, did not provide him with the proper number of men. Okay. Now, Mr. Antoniou, under oath, testified that he always had three men there. But I suggest to you that, more important than what Mr. Antoniou testified to under oath, after he had been prepared to testify by an attorney --

MR. STEARNS: Objection.

MR. GOLDSTEIN: This is the statement of Mr. Antoniou that was taken of him some ten days after the accident, and he says specifically that he had two men with

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him: Mr. Smith and Mr. Porss, and nobody else. Nobody else. And he says it clearly, and you can read it. This is in evidence. It is Defendant's Exhibit E,and it is for your reading, and I suggest to you that if you want to read the truth of what happened here, you read Mr. Antoniou, the defendant's own witness' testimony, because they brought him in for his deposition; it was his deposition that they took and that I cross-examined him on, because they wanted him to say, to change his story just a little bit to say that there were three men there.

MR. STEARNS: Objection, your Honor. It refers to attorneys in a kind of personal way.

MR. GOLDSTEIN: I think Mr. Stearns mentioned them by name about six times. I think I can mention his name -

THE COURT: It is not mentioning itself; it is how you mention it.

MR. GOLDSTEIN: Yes; I know, Judge. So many things I know.

Okay.

THE COURT: Proceed.

MR. GOLDSTEIN: Because Mr. Stearns calls a case preposterous, and because he tells you that it silly doesn't make it preposterous or silly. It simply means that he is doing his job as an employee of a law firm defending this

shipping company, and I would expect him to use those words or other words.

Please, don't be misled by that. You are to discuss among yourselves the facts of this case, all of the evidence that was brought to bear in this matter by both Mr. Stearns and myself.

I know it is rather hard because of what happened during the course of the week in the battles in this courtroom, but the fact remains that your situation is to determine the facts of this case, to determine the truth or non-truth of what Mr. Porss has told you and what all of the other people who came to testify have told you.

Now, I have no argument with Mr. Isaac, none at all. Mr. Isaac is employed by a shipping company, and he tells you that the hose when dry and weighed weighs 118 pounds, and he says, "Well, you have to take about half of that to determine what forty feet would weigh, because that was a seventy-five-foot hose, and I can understand that that is reasonable, reasonably accurate mathematically, and then this weighs thirty-five and a half pounds, and I can understand that.

But you remember that Mr. Stearns told you two or three times that Mr. Porss said it weighed four to five hundred pounds. Number one, Mr. Porss never said four to five

EBP 11

hundred pounds. Second of all, it is quite obvious that Mr. Porss was talking about a situation where there was water in the hose.

You also remember that Mr. Antoniou said that hose must be empty, and on page --

MR. STEARNS: Your Honor, there is absolutely no testimony on this.

THE COURT: The jury will have to recollect that. I cannot sustain an objection like that. These are claims of course on each side. You have to determine what the facts are.

MR. GOLDSTEIN: Page 21 of Mr. Antoniou -- and Mr. Stearns read this:

"Q The hose is drained when you are pulling it up; is that right?

"A Right. It should be completely empty."

And on page 20, on the question that I asked Mr. Antoniou:

"Q Can two men pull up the machine at the same time?

"A It's impossible."

Now, we have heard a lot of situations, a lot of stories here about what that fourth man is doing there. Number one, let me tell you what the third man is doing there, because Mr. Stearns tries to take that third man out

EBP 12

of this situation. He says, "Well, what's the difference if the line men stepped on the line?" That doesn't make any difference, because that's the area that comes after he has pulled?

Let me tell you what the situation is, and if I may I am going to stand up on the desk, where you can see my feet, because if the line is being pulled because of the hose going back into the hold, into this tank,and a man does not step on the line, then it means that he has the entire pressure or the entire weight of the hose and the line racing through his fingers, too.

If he had put his foot on the line at a point after his hands, then he has an alternative way of holding that.

Now, this isn't something where you say, "Well, he doesn't have to put his foot on the line every time." And I suggest to you that it means just that, because it is exactly what it is meant to be: a safety factor. It is another security device to hold the line and the hose, not during the pulling up but just in case what happened here does happen: that is, the hose does start to slide,and it does start to go out of control, and there you have a man with his foot not on the line. He is absolutely powerless to stop that hose from pouring back into the hold.

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When he is powerless to do it and he doesn't do his job because he didn't have his foot on the line, then the third man holding the hose that's pouring back, he's got everything on his back. There is nothing that he can do to stop the hose.

The only thing that might have helped him, because it would have at least given two men to hold that hose, would be if there was a fourth man.

Now, I know that the fourth man is there only to get rid of the hose so that it doesn't entangle around the third man's leg. Of course, that's so. But the fact remains that if the job of that fourth man was to flake that line out, as the language goes, are you going to tell me or does Mr. Stearns suggest to you that that fourth man, if he saw what was happening, would not have the duty to grab hold of that hose together with Mr. Porss, who was the hose man, and hold that thing in place and hold it and stop it from going down into the hold?

Mr. Stearns suggests to you that the fourth man doesn't do anything here. He is a safety man. That's exactly the reason. That's why the union rules call for safety men. That's why Mr. Antoniou said that a fourth man is sometimes necessary. That's why Mr. Smith says that, yes, a fourth man is necessary.

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This is the deposition of Mr. Smith, and this is, again, a question read by Mr. Stearns:

"Q Is there room for a fourth man?

"A Yes, but it is not a necessity.

"Q That means that it is not required?

"A Yes, but it is not a necessity, and the only time a fourth man would be coming is if the hose is getting piled up behind the man who is using the strain, and he will just stretch it out."

So what we have is a situation where three men can pull it up, if all of them do their job, but you have a safety man back there, cleaning the footing area for that third man, getting rid of the extra hose, and he is a man who could have at least taken on half of the weight of the hose going back into the tank with Mr. Porss at the time that this accident happened.

But, no, there was no third man. The second man didn't put his foot on the line. And Mr. Smith, the center man, allowed the entire hose to slip back. That's what it was, and I brought it back toyou in the reverse order.

Smith allowed the hose to slip back because he didn't grip it, and you remember smith saying, "Well, you don't grip it; you just sort of cradle it in your hand. You don't grip it." So that there is really nothing that Smith

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can do, because he doesn't grip the hose. There is nohold on the hose.

He talked about the real stress being taken up by the line man and by the hose man. Now, if the line man doesn't take up his stress and everything is thrown onto the hose man, who was in his case Porss, you have an accident,and that's exactly what happened, pure and simple.

Now, Mr. Stearns says that, "Well, Mr. Porss really has no experience. He doesn't know what happened here." I agree. He has no experience. Does that mean he doesn't know what happened? Does that mean he doesn't know that he felt the hose slipping forward, back into the hold? And he doesn't know that he was driven forward trying to hold the hose from stopping?

That's all he knows. He doesn't have to know the technicalities. He tells you that that hose weighed from three to five hundred pounds, and he's telling you that it had water in it, because the hose, as you know, weighs half of 118 pounds. There's only fifty-nine plus the thirty-five for the machine. That, all in all, is less than a hundred pounds, and if that thing weighed three to five hundred pounds and if Mr. Porss was caused alone to try to stop that from going back into the hold, then there is in fact liability here, because you heard Mr. Antoniou, and you heard Mr. Smith

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say that that hose should be empty -- empty -- of water, that they allow it to drain, and the question in your mind is, whether or not in fact they did allow it to drain, and, in fact, if they had allowed it to drain, whether or not this accident would ever have happened.

I suggest to you that that is exactly what the cause of this accident is, that the water was not allowed to drain out, that the weight of the hose, the machine and water -- water, which weighs sixty-two and a half pounds a cubic foot --

MR. STEARNS: Objection. There is no testimony to that.

MR. GOLDSTEIN: Mr. Stearns agreed that it did.

MR. STEARNS: I did not.

THE COURT: All right. The jury will have to recall.

MR. GOLDSTEIN: -- and that the weight of the water in the hose, because it wasn't allowed to drain out, is what pulled a heavy piece of equipment down into the hold and Mr. Porss with it, and that's how this accident happened, and that's why it happened, and that's why I suggest, with all respectfulness, that is why you should find in favor of Mr. Porss in this case.

Now, Mr. Porss goes into the Public Health Service Hospital in New Orleans. He tells them what happened. They

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treat him, and they find that there is an acute lumbosacral strain, and they send him back to New York, because they mark him fit for travel but not fit for duty, and he goes back to New York, which is his home town, and he goes into the Public Health Service in Houston Street, and you heard him call it "Hewston" Street. You know in New York it's "House-ton" Street, but in the rest of the world it's "Hewston" Street. And he gets treated.

Now, let me read this to you, because all of this record that I am going to read to you is in the medical records that you have a right to read. Those are all in evidence. I want you to read the dates and the reasons why Mr. Porss was either fit for duty or not fit for duty.

In each and every time during the period from 1971 up to September 26, 1972 --

THE COURT: This, of course, encroaches on the maintenance and cure case.

MR. GOLDSTEIN: This is a question of status of this man during the course --

THE COURT: That is all that the jury may comprehend or consider.

MR. GOLDSTEIN: Right. That's correct. But they do have the right to consider credibility.

MR. STEARNS: Your Honor, I would suggest that if instead of reading from shorthand notes Mr. Goldstein would

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read from the actual record, all this would be clearer. He says --

THE COURT: Read from the record, counsel.

MR. GOLDSTEIN: If your Honor please, can I read from what I want to read from and suggest --

THE COURT: You may read from what you want to.

MR. GOLDSTEIN: Fine. And suggest to the jury that they can check on any part of it.

THE COURT: Yes, yes. Go ahead.

MR. GOLDSTEIN: That is exactly what I did.

THE COURT: And I think they should examine these hospital records.

MR. GOLDSTEIN: I suggested to them that they should do that.

THE COURT: Yes. Well, I join in your suggestion.

MR. GOLDSTEIN: Very good, sir. I thank you very much.

THE COURT: More than that.

MR. GOLDSTEIN: May I suggest again that you can check each and every one of these dates if you want to. He is marked unfit for duty from 6/12, when he first went into New Orleans, until 6/18, when he was sent hom from New Orleans, not fit.

That's the acute lumbosacral strain. He is marked

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unfit. That is not fit. With a lumbosacral strain on 6/21, when he comes into the Publis Health Service in New York, he is marked unfit. He is marked unfit on 7/19/1971 with a lumbosacral strain. He is then marked fit for duty with a return visit -- R.T.C. -- and you remember there was some discussion about what that means, but the first word is "return". I know that.

That's on August 6, 1971.

Now, if you remember, he goes back during September and October, but that was for bronchitis. That was for the cold that he had, and you rememb Mr. Stearns made a big deal about that. We are not suggesting that he was unfit for duty for his back during that period, but when you get down to 11/23, you find that he was marked unfit for duty with a lumbosacral strain.

He was marked unfit for duty with a lumbosacral strain on December 2, 1971, and on January 11, 1972, and on February 1, 1972 and on February 5, 1972 -- all marked unfit for duty, each and every time that he went back there.

And then he was marked fit for duty on 3/10, if your Honor please, again with an RTC after it, to return.

And he was marked fit for duty again RTC on 4/21 and again on 7/20, and then he was marked not fit for duty on 8?17,1972 for his back, and then he was marked fit

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for duty on September 26, 1972,with the words "R.V. in three months". Return visit, three months.

So that it is quite obvious that although Mr. Porss was marked, although sometimes fit for duty during that period, he was always asked to report back. He was always asked to be looked at by the doctors. The doctors asked that he return. He was never completely discharged, not to return.

He was marked fit for duty sometimes. He was marked unfit for duty at other times, and it is for you to say exactly what his condition is, and the only way that I know that you can say it is by reading whatever you feel like reading from those records: by taking Dr. Seaman and by taking Dr. Lodico and putting it all together.

I am not suggesting to anybody that you have an easy job. I am suggesting to you in fact that you have a tough job. It is a job that is very, very important to Mr. Porss because he has lost a lot of wages and a lot of time at sea, and it is something that you must consider this one time only.

"Just remember, if you hold that well, Mr. Porss, we can see you being hurt for a certain amount of time, but we can't see you being hurt in the future."

Well, we can't come back in the future. Not only do we have to find out whether or not somebody was wrong in

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causing the accident; not only do you have to find out what Mr. Porss' losses are up to this date, but you have to determine what his losses are in the future, and that is even more of a difficult job, and yet you have to do it, because that is what the jury system requires of the jury and what it requires of you. You have sworn to uphold your duty. Well, then, you have to take that bull by the horns, so to speak, and go into that back room and decide what you want to do about this accident for past, for present and future.

Now, I want to find out a couple of things.

If we suggested to you that Mr. Smith really didn't work with Mr. Porss, I think I would be some kind of a damned fool to suggest that.

THE COURT: May I have that again?

MR. GOLDSTEIN: I said I think I would be some kind of a damned fool if I suggested that.

THE COURT: I know what you suggested, but read the entire statement, the last sentence or so.

(Record read.)

THE COURT: All right. We will leave it that way as it stands.

MR. GOLDSTEIN: But you will remember one thing: Mr. Porss was on that ship for two days, working, from the 6th, when he got on the shop, until the 8th, when he was hurt.

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He then remained in his bunk for three more days and went off the ship. I don't know whom he met and whom he didn't meet, and I don't know how many friends he made in those two days that he was working or not. You've got to decide, seeing Mr. Porss, how many people you think that he really knew and who really knew Mr. Porss, or was he somebody who just got on to a ship two days back in June of 1971, came on, and in a couple of days he was off, and that was the end of Mr. Porss -- just like somebody who came in in a fog, so to speak.

I don't know the answer to these things. I am not suggesting to you anything. I am suggesting only that it is something for you to consider whether or not these men really knew whom they were working with and whether or not Mr. Porss really knew whom he was working with.

I never suggested that it had to be one man and one man only who did the work at one particular time. I know this. Mr. Antoniou says that four machines work at one time. I know that Mr. Antoniou said that he was working, as I recall it, from 0600 that morning until 2300, and Mr. Porss was working only from 0800, as I remember it, to 2300. So that's only five hours out of the total amount of about eighteen hours that Mr. Antoniou said that he was working on these machines.

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I know this: that Mr. Antoniou said that, "During that time I only had two men working with me," and he mentioned one as being Mr. Porss, and he mentioned the other one as being Mr. Smith, and he never mentioned Mr. Wherrity at all, and so in order to tell you or to tell somebody that, "I'm not at fault. I didn't order too few men to come over here," he tells you that he was the third man. He did all of the work, and never does he suggest that he brought in a fourth man to do the work, but on his deposition he tells you that, "Well, from time to time it's a good idea to have somebody flake the line away from the third man, the hoseman."

You have got to decide whether or not you think that Mr. Antoniou was doing nothing more than defending himself. He is not a party to this suit, but he has his own pride as a worker, and he was really being told point-blank, "Mr. Antoniou, you loused it up here. You only brought in two men, and you should have brought in three." And he knows it.

MR. STEARNS: Your Honor, can I object to this argument, which is absolutely contrary to what plaintiff has testified to?

THE COURT: The jury will still have to pass on the facts. I regret that it becomes necessary to have these interruptions, too, although I can understand it.

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MR. GOLDSTEIN: And he tells you in his own statement that he only brought in two men, and now he is called upon to explain why he didn't have three men and, in fact, why he didn't have a fourth man there.

So he tells you, "Well, I was the third man. I worked, myself, and therefore we complied with the union regulations."

The question is, really, how much money Mr. Antoniou was trying to save for the shipping company by only bringing in two men on overtime work instead of three men on overtime work, and how much he was trying to show that he was helping out the shipping company, which he favors when he is working for them.

Mr. Stearns tells you that, "Well, Mr. Antoniou isn't working for us now," but he was working for them then, and he was working for them then when he wrote this statement, and that's when he was trying to protect himself, so that he comes in later on, and he says, "Three was three men. I was in fact the third man."

And he never brings on a fourth man, and, as a matter of fact, he never even brings on a third man, and that's what you can read out of his statement, and I suggest to you very strongly that that is exactly what you do. Read Mr. Antoniou's statement and see what he himself, the

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Bo'sun, the superior officer on that particular operation, says about that operation, and then you tell me if that ship didn't do anything wrong.

THE COURT: All right, counsel. You have covered that phase, I think.

MR. GOLDSTEIN: In terms of wages -- by the way, I don't know if I mentioned it, but during the course of all of the time that Mr. Porss was at the Public Health Service Hospital, he was also prescribed a corset by the Public Health Service doctors. Not only was he prescribed a corset, but isn't it interesting that he was prescribed a corset on one of the days that he was marked fit for duty? They gave him a corset to do work, the lumbosacral corset -- right on the record. Read it, and you will see. I saw it.

So that when you talk about whether or not this entire thing happened, whether or not Mr. Porss went to the Public Health Service Hospital, whether or not he was marked unfit for duty for that period of time from June until September of 1972, over a year, almost a year and a half, you have to at least give consideration to all of the times that Leroy Porss went to that hospital, all the times that he was examined by a doctor, all of the times he was marked unfit for duty, the fact that he was given a corset and the fact that there is certainly a reasonable question or should

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be in your mind as to whether or not Mr. Antoniou is lying when he says that, "I had three men and sometimes four with us," that his statement says two; and Mr. Smith, who said, "I remember three men, and four was sometimes important" -- that's what we are talking about.

Now, on damages -- by the way, before we get to damages, I want to talk about this medical business, because that bothers me. Mr. Stearns talks to you about prostatitis, and he says, "Well, everybody knows that really what he had here, these back pains, was prostatitis." He had the prostatis from 1967 all the way up into about 1970, and he was treated. He wasn't marked unfit for duty when he had it. He would go in for a check-up, and they would say, "Yes, you have prostatitis." They would give him medicine, and he would go back to the ship. Never marked unfit for duty.

Do you find one statement of any prostatitis in those marine hospital records after the date of this accident? Go through, and you won't see it. He didn't have prostatitis. He had LSS -- LSS -- lumbosacral strain. That is what he had, a very, very different picture from prostatitis. You even go to a different department in the hospital. You go to an orthopedic department for the LSS, and that's why he went to the orthopedic specialist in the hospital, who had him marked fit for duty the one time, you remember.

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But when he went for prostatitis, he went to the urological department, to the general medical department, and he was marked for prostatitis. He didn't go to an orthopedist for that, and none is necessary. An orthopedist is out of his class in that area. And so is, by the way a ugologist to determine the lumbosacral strain.

So Mr. Porss is asked to go to the orthopedic department for evaluation, and that is how he got to the doctor.

So that we are talking about something entirely different, something that happens in a different part of the body, something that has a totally different reason, and you remember Mr. Stearns' great effort to get in the reason for it, and I really don't know what the reason is, but I suggest to you that since you think that you know what the reason is -- and I am not suggesting --

THE COURT: That is out of order.

MR. GOLDSTEIN: I have the right to talk about it. Mr. Stearns raised it.

THE COURT: I ask the jury to disregard it, and I again ask the jury to disregard what counsel is now stating.

MR. STEARNS: Your Honor, the reference is in a document offered in evidence by Mr. Goldstein.

THE COURT: Proceed, counsel.

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MR. GOLDSTEIN: You mean you found what I couldn't find when the Judge asked me to find it.

THE COURT: Don't argue with him.

Disregard that, members of the jury.

You are not going to get up here and argue with Mr. Stearns. Proceed with your summation.

MR. GOLDSTEIN: Very well.

THE COURT: Otherwise, we will close now.

THE COURT: So you heard the situation concerning the prostatitis. You know it all. I know that we have gone a great, greay way in the last number of years in a literal attitude towards our fellow people, and I suggest that you totally, totally disregard that you heard concerning the reason for prostatitis, because it has absolutely nothing at all to do with the accident of June 8, 1971 -- nothing at all. It is something that happened many, many years ago, under circumstances that I have absolutely no knowledge of, and we don't know anything about it at all, except that we do know that it doesn't cause a lumbosacral strain. It might cause prostatitis, and maybe it did in this case -- I don't know. I never checked into it. I couldn't care less about it in this trial. But I do know that it doesn't cause a lumbosacral strain.

Mr. Porss' claim here is only for the back con-

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dition. It is not for prostatitis, so I ask that you do not consider it at all.

Now let's talk about damages.

Mr. Stearns tells you that Mr. Porss was out of work for a year and a month -- thirteen months, as I recall it, and there is no question about that. He was out of work for thirteen months. Before that time, he was employed for about fourteen straight months aboard a ship called the Pecos, and he was employed from September 1, 1967 to October 20, 1968. He was then employed aboard the Lynnfield Victory from February to May of 1969.

He was then employed aboard the Steel Worker. And, by the way, seamen, when they get off a ship just go down to the union hall, and they get the next available ship. They don't go with the same employer all the time. There is no need for that, no requirement it. Seamen don't die -- they simply get off a ship and go down to the union hall and register, and then they get another ship.

So you see different ships. This is customary for seamen.

He then sailed aboard the Steel Worker from August 1969 until January of 1970, and then the Azalia Victory from February 1970 through May of 1970, and then he stopped.

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Now, he had just put in substantially full time from 1967 up through May of 1970. He worked ten months in '68. He worked nine months in '69, five and a half months in 1970, and then, of course, he went on to '71 and did not work.

Now, why didn't he work? I don't know. It was never brought out in this case. Maybe he wanted a rest. I really don't know the answer. There was no lawsuit pending. He wasn't getting any money from anywhere. There were no claims o any kind against anybody. He simply didn't feel like working. He had put in a solid almost two-year period of work, and if he wanted to take off, I guess he was entitled to take off. He didn't harm anybody. He didn't do anything.

The one thing it does show is when he goes back to work -- and I assume that his money was starting to run low, and he had no obligations, you understand, you realize. He has no obligations. He lives by himself in Yonkers. He has no obligations.

He decides to go back to work. Do you think that at that time when he decides to go back to work the thing he is looking for is an injury? It's the last thing he is looking for. He has gone back to work. If he wanted to stay out of work, he could have stayed out of work. He was out of work. There is no requirement that he would have to work a certain amount of time and a certain period of time. He was

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out of work, and he could have continued. It's very easy to stay out of work. Simply don't go down to the union hall to register.

As a matter of fact, he did go down. He did register. He did sign aboard the Aleutian, and he did start to work. The last thing that the man wants on the two days after he gets on a ship after thirteen months, because he needs the money, is to get injured. Because what does the injury get him? Has he earned any money? Did he earn any money? Does he work until November of 1972, another fifteen or sixteen or seventeen months that he's out of work? That's what they would have you believe.

The whole thing is so contrary to human nature, and yet they would have you believe that. That's what he did. He came aboard the ship with a scheme in his mind, with a scheme in his mind, needing money, not having worked for thirteen months, with a scheme in his mind to get sick or claim that he was sick so that he wouldn't be able to work, because, heck, if you make a claim and you get back on a ship, everybody is going to laugh at you.

Well, obviously, if you have a legitimate illness, a legitimate illness, and you don't work, then it is reasonable. But he can't afford to have anything like that. That is the last thing he wants. And he goes back to work and he

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gets hurt, and he is out of work, unfortunately, again for seventeen months, and it is those seventeen months that we are talking about, because it is that seventeen months that he lost what he is able to earn, $900 a month, and that's what we are talking about.

Now, up to November of 1972, a seventeen-months period, almost a year and a half -- now I have taken an average, and I don't know if you want to consider it. It is absolutely up to you. I said to myself, "I know that Mr. Porss worked ten months during '68, and he worked five and a half months, nine months during '69, five and a half months during '70 and seven months during 1967. I took an average of about eight to nine months a year as an average of what he would work for the five, four or five years before that, not including the one year that he decided to take off.

If you are talking about an average of maybe eight and a half months a year, on a seventeen-month basis, eight and a half months would be just a drop over two-thirds of seventeen, so it would probably be an average of about twelve months for the seventeen months that he would normally have worked, if you look back on his average of his work record for the five years before that.

If he lost twelve months off that seventeen months of work, at 900 a month he has lost $10,800, and we ask that

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you determine that he is entitled to those damages for those lost wages of $10,800 up to the time of November of 1972.

We also suggest that there are additional periods where he was taken off the ship with a master's certificate, from a ship called the Jeff Davis, in 1973.

MR. STEARNS: Objection. There is absolutely no testimony about any Jeff Davis ship or whatever. This is wholly new.

THE COURT: Yes. The jury will regard only the admitted testimony and proof.

MR. GOLDSTEIN: My recollection of Mr. Porss' testimony is that he is unfit for duty now, or he was unfit for duty recently. Now, if you remember it differently, you take your recollection. Don't take mine, okay? It is conceivable, and attorneys sometimes do -- they know what the situation is; they know a lot more facts than are put into evidence, and they automatically assume that they have gotten everything in. If I have forgotten to get anything in about any ship, don't you consider it.

MR. STEARNS: Objection, your Honor.

MR. GOLDSTEIN: I will leave it up to your memory.

THE COURT: Now counsel is conceding that perhaps counsel may have known something and mentioned it as if there had been proof when in fact there was not proof.

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MR. GOLDSTEIN: If you don't --

THE COURT: All right. The jury will determine it on what they have heard, counsel. Let's not debate that question. Go on, please.

MR. GOLDSTEIN: I suggest that you consider your own memory and nothing else. I ask you to consider the fact that this is a situation involving pain, that the low back strain that Mr. Porss has suffered with from June of 1971 until the present time is a painful one and that you have every right and should in fact award him damages for the pain that he has sustained.

Pain is a very, very peculiar thing. Nobody has ever yet in this entire world put a price on pain. It is one of the most difficult things for a jury to consider.

What is the degree of money? Because that's all we can possibly ask for in a court of law. What degree of money compensates a man for pain? It involves two people having a different threshold of pain. The same injury, the same type of injury may disable one person and not disable another one. Nobody knows. One man may be able to go to work with pain and another man may not. Nobody knows. Nobody knows what pain is.

The only thing I suggest to you is that lumbosacral strain is a painful illness. It is a condition that causes

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pain. And I ask you to make a determination, if you find the defendant is liable, for the pain and suffering that Mr. Porss has had since June of 1971.

This is, again, for your determination and not for mine. Okay.

You talk about and Dr. Seaman talked about what the future is, and Dr. Seamsn showed you that there was the inability to fully move the back area because of the overlay of two x-rays, one upon the other, which he said does not show in either x-ray along, but when you put them together does sho up, and he suggests to you that that is the real cause or the real reason for the continued disability that Mr. Porss has, and he says he doesn't know how long it is going to last. He doesn't know if it is going to be of short duration or long duration.

I can only suggest to you that Mr. Porss is now forty-six years old, that the normal working period would be until sixty-five. That's twenty-one years. I don't know how much time he is going to lose at twenty-one years. You've got to make that decision.

Talking about making decisions, you've got to make that decision. You may make it based upon what he has lost from June of '71 up to the present time and in some way follow it out through the next twenty-one years. I don't know

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how you are going to do it. I only know that you have the duty to do it, and having that duty, I know that you will do it in some way, in some fashion reasonable and fair to all of the parties, and that's all that we as attorneys can ask you.

So that we now have three questions on damages: we have questions of wages, both past and future; we have questions of pain, and we have questions of -- well that's eight. Wages past and future are two, and pain and suffering is the third one, and that is what we are asking you to give to Mr. Porss. Ten-eight, which we know he has lost in wages to date; the future wages in some amount that seems fair to you, and the pain and suffering, and again in a sum that seems fair to you.

You make your determination. You let us know how much you think this matter is worth, and whatever you determine, we will abide by.

I thank you.

THE COURT: All right. Very well. There will be a recess. It is now twelve o'clock, and I think the wise thing would be for you, the jurors, to go to lunch at this time and to return at 1:45 this afternoon. And please do heed my instructions.

(The jury left the courtroom.)

THE COURT: Will the attorneys give the exhibits

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AFTERNOON SESSION

1:45 p.m.

(Jury present.)

CHARGE OF THE COURT

(Lovell, R. H.)

THE COURT: Madam forelady, and ladies and gentlemen of the jury:

You are now to enter upon your final function of duty in this case as jurors and that is to decide the facts in this case. At this time, you will consider both the questions of liability and the damages. You, of course, are the sole and exclusive judges of the facts. I pass upon the weight of the evidence, you pass upon the credibility of the witnesses, and you determine the reasonable inferences to be drawn from such conflicting evidence as there may be in this case.

It is my duty now to instruct you as to the law and it's your duty to accept these instructions as to the law and to apply them to the facts as found by you in the course of your deliberations.

In your determination of the facts you rely solely upon your own recollection of the evidence. I may interpolate this little note: If, however, at anytime you believe that you would like to have your recollection

[illegible] refreshed, you may ask the Court, through a message signed by your forelady, under which, as a result of which I shall ask the reporter to read the particular testimony referred to. I ask you to make it as definite as you can.

What I have said from time to time and what I say in this charge, or what counsel may have said during the course of this trial, or during their summations, of course, is not to be taken by you in place of your own recollection of the facts or the evidence in this case. No comments by counsel or by the Court are evidence, nor are you to draw any inferences from them.

During the course of the trial I have, naturally been, been forced to pass upon questions concerning the admissibility of evidence. You are to draw no inference from the Court's rulings with respect to the admission or the rejection of evidence. These rulings relate solely to matters of law and you are not to consider in any way the arguments of counsel in regard to these rulings.

Neither are you to be concerned by any questions asked by the Court, nor that the Court asked questions. These questions were asked solely to elicit or clarify facts at issue. Nothing that the Court said is to be construed to indicate what your determination should be except, of course, that I shall expect you to follow the

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instructions which I am now giving you.

You must completely ignore answers by witnesses made either voluntarily or in response to a question where such answers have been stricken. Then they form no part of the evidence in the case, and they may not be considered by you in determining your verdict.

The statements made by the attorneys in the summations are of course in the facts or evidence. The evidence, as I have said before, comes from the testimony of the witnesses on the stand, the depositions or portions of depositions read into the record, and any exhibits admitted into evidence.

It is fundamental, of course, that you are to approach your duties coolly and calmly, without emotion. Emotion is not to determine this case. Both direct and cross-examination should be considered by you. You may draw inferences from the testimony but you are not permitted to draw inferences from other inferences. No verdict is to be based upon speculation or conjecture.

In this case there is perhaps some direct and some circumstantial evidence which has been offered. Direct testimony is where a witness who saw the commission of an act testifies as to what he saw, heard, discovered, what he knows of his own knowledge, something which com-

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to him solely by virtue of his sense.

Circumstantial evidence, on the other hand, is that evidence which tends to prove a fact in issue by proof of other facts or a chain of other facts, which have a legitimate tendency to lead the mind to a conclusion that the facts exist which are sought to be established. The law generally makes no distinction between the weight to be given to either direct or circumstantial evidence. Both direct and circumstantial evidence must be considered by you in determining your verdict, but always in accordance with all of the other instructions which I now give you.

We begin with this fundamental principle, that the plaintiff, having made these charges, has the burden of proving the material allegations of his complaint by a fair preponderance of the credible -- that is, the believable evidence. The term "fair preponderance of the credible evidence" means the greater weight of the evidence. It refers to the quality of this evidence rather than the number of witnesses. It means that the testimony on the part of the party on whom the burden rests must have more convincing weight than that opposed to it.

You may say that a fact was proved by a fair preponderance of the evidence when all of the credible

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evidence tends to persuade you to believe what the witness or witnesses have said as against other testimony that may have come into the case.

As I have said, the burden is on the plaintiff. In this case, if, after considering all the evidence, you find that it preponderates in favor of the plaintiff as to all requisite elements, he has sustained the burden of proving his case by a fair preponderance of the evidence.

If the credible evidence is evenly balanced, then the plaintiff has failed to sustain his burden, and of course, if the evidence is in favor of the defendant, then the plaintiff has also failed to sustain his burden and he cannot recover.

The defendant does not have to disprove anything. The defendant has no obligation to come forward with any evidence. Whether it does or not, the fact remains that the defendant is entitled to a verdict in its favor if the plaintiff fails to sustain his burden of proof. That is, to sustain his claim or claims by a fair preponderance of the credible and believable evidence.

Now, the mere fact that an accident may have occurred, does not entitle the plaintiff to a verdict against the defendant. Liability follows not from the injury or from the happening of an accident, but from the

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breach of some duty owed by the defendant to the plaintiff. Obviously, the plaintiff must prove, therefore, that some accident occurred. The mere fact that the plaintiff had pains in the back is likewise insufficient to create liability against this defendant.

Now, the plaintiff contends that he was injured on board this ship, the OVERSEAS ALEUTIAN, on June 8, 1971, while in the course of his employment as a seaman engaged in the moving of butterworthing equipment. Plaintiff alleges that the defendant's conduct at the time and place in question was negligent in the following particulars:

1. The defendant's employ or employees failed to properly raise the hose and line by failing to hold and grip them, the hose and line allegedly falling back into the tank.

2. The defendant was negligent in failing to provide a sufficient number of competent seamen to do the butterworthing job.

Now, in order to find for the plaintiff on this claim of negligence, it is not necessary that you find defendant was negligent in each of these two above particulars; you need only find negligence in one of these particulars.

In addition to these claims of negligence, the

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plaintiff also contends that the ship, OVERSEAS ALEUTIAN, was unseaworthy, in failing to provide enough seamen to perform the butterworthing operation in a safe manner.

The defendant shipping company denies that any accident occurred. The defendant denies any negligence on it's part, and denies that the ship was in anyway unseaworthy. It is one of the defendant's positions that if the plaintiff suffered any injuries, these injuries were due to his own contributory negligence.

In order for the plaintiff to establish negligence he must prove by a fair preponderance of the credible evidence, first, that there existed a hazardous condition with respect to the operation of the butterworthing equipment on this ship on June 8, 1971.

Second, that the defendant had notice, either actual or constructive, of this unsafe condition prior to the plaintiff's accident.

In addition to these factors, he must show the approximate cause as hereinafter explained.

This is the third factor: that this unsafe condition or the negligence, was an approximate cause, in whole or in part, of injuries or accident sustained by the plaintiff.

The term "actual notice" means that the defendant,

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or it's agents, knew of the allegedly unsafe condition.

The term "constructive notice" means that the allegedly unsafe condition existed for a sufficient time prior to the happening of the accident and was in such a place that the defendant should have known about that condition.

I shall now attempt to explain "approximate cause." An injury or damage is approximately caused by an act or failure to act whenever it appears, from a preponderance of the evidence in the case; that the act or omission to act, played any part, no matter how small, in bringing about or actually causing the injury alleged.

This defendant shipping company, of course, is a corporation. Obviously a corporation can act only through it's officers, employees or agents; and consequently any act or omission to act by an agent or employee of the corporation, if it's done within the scope or field of his employment, is held to be the act of the corporation and the corporation will be held responsible. I think that is more or less elementary.

A ship owner is liable for injuries to a seaman which result in whole or in part from the negligence of another member or members of the crew. In other words, the negligence of a fellow crew man may cause the defendant

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to be liable under the law, and if you find that any of the plaintiff's fellow crew men or superiors, in whole or in part, caused or contributed to the accident, then the defendant is liable in negligence, provided these factors heretofore just mentioned have been proved.

In this regard, if you find that an act or failure to act of the employee of the defendant, created a risk or harm to the plaintiff and that the risk or harm are such that a reasonable and prudent person under similar circumstances would have anticipated the risk and guarded against it, then the act may constitute negligence.

If the defendant requires a seaman to do his work in a dangerous manner when there are other and safe ways to do it, then the defendant may be held to be negligent.

I also instruct you that the failure of a defendant to provide sufficient numbers of crew men to do a job, if there is notice and proximate cause, is negligence. And then, provided, of course, this proximate cause existed.

Now, I charge you that no matter what I have said before about the liability, the defendant shipping company here is not assurer of the safety of it's seamen. it is not obligated to furnish the plaintiff with an

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accident-proof ship. The standard here is the exercise of reasonable or due care under normal circumstances.

In determining the number of men assigned to the butterworthing, whether the number of men assigned to this butterworthing operation was sufficient, you may consider the contract in force between the union and the plaintiff's employer. That contract called for three men to perform the butterworthing operation.

As hereinafter stated, the plaintiff himself testified, I believe, that there were three men on the job, to wit: Schmidt, Wherrity, and himself.

Seamen, of course, must exercise reasonable care in performing their duties aboard a vessel. A ship owner is not obliged to instruct an experienced seaman in the performance of a routine job. In exercising reasonable care for his own safety, a seaman is under a duty to make use of his own faculties, his own senses to observe and avoid dangers and injury to himself, and he must be presumed to know what the ordinary use of his faculties would make apparent to him.

If a seaman is injured in one of the performable hazards of his calling without there being the fault of anyone else, the ship being seaworthy, he must bear the loss himself. However, a seaman does not assume the risk

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arising in whole or in part from the negligence of his employer or his fellow employees. As I have said, the defendant has a continuing duty to see to the safety and care of the crew and exercise reasonable care for a seaman's safety.

Now a word about custom. Custom and practice is relevant and significant. What is customary in a trade may be evidence of due care. However, compliance with custom and practice is not in and by itself the legal measure of due care. The legal measure is reasonable care under the circumstances. Nevertheless, the testimony as to custom may be considered by you in determining whether or not reasonable care was exercised.

Now, here the defendant has interposed a defense of contributory negligence. To sustain this defense, the defendant, the shipping line, has the burden of proving that the plaintiff's injuries were brought about by reason of his own negligence, and that burden is the same as that of the plaintiff's in proving the defendant's negligence.

Contributory negligence is the doing of some act or an omission by the plaintiff amounting to a want of ordinary care and a due care for his own safety. It is negligence on the part of the person injured which, cooperating in some degree with the negligence of another

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if that is present, helps in proximately causing the injury.

Now, the defendant's allegations that the plaintiff was contributorily negligent does not bar recovery. However, the plaintiff's own causal negligence, if established, is a factor to be considered by way of a percentage in mitigation or diminution of any damages to which the plaintiff might be entitled should you determine that he is entitled to a recovery. E. g., it might be 25 percent, it might be 50 percent, it might be any other percentage, and you will see how that is stated in the special verdict.

Of course, you need not consider this problem of contributory negligence unless you have first found negligence and proximate cause, as I have already instructed you, or, on the other hand, if you have found unseaworthiness and proximate cause as I am about to instruct you.

We pass then to this doctrine of unseaworthiness. The plaintiff does not have to prove both negligence and unseaworthiness. It is sufficient if he proves either negligence, as I defined it, or unseaworthiness, as I shall explain it.

The ship owner's liability for failure to furnish a seaworthy vessel is a peculiar species of liability without fault. It is not limited by the conceptions of

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negligence. The two are separate types of claims.

With respect to this claim of unseaworthiness, the owner of a vessel has an absolute duty to provide a seaworthy vessel. This means that the defendant is obliged to furnish and maintain a vessel that is strong, staunch, and properly equipped with reasonably safe and suitable machinery, equipment, and appurtenances, and safe working conditions.

This obligation of the defendant to provide a seaworthy vessel includes providing a reasonably competent crew, adequate in number to perform it's duties. If you find that the defendant ship owner failed to do so, then the vessel was unseaworthy, and if this failure was a proximate cause of any accident sustained by the plaintiff, then the defendant is liable.

Now, seaworthiness is reasonable fitness for the particular voyage, or reasonable fitness for the particular use which the plaintiff was making of that portion of the ship at the time of his alleged injury.

For a vessel to be found unseaworthy when injury has occurred, the defective condition or conditions need not be such as to render the entire vessel unfit for the purpose for which it was intended. If a defective condition is found to exist on the ship, and if it was one of

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the proximate causes of the individual's injury, then the ship is unseaworthy as to him.

In determining the claim of the plaintiff that the vessel was unseaworthy, you must remember that the duty to provide a seaworthy ship does not depend at all upon the negligence of the ship owner or it's agent. Due diligence of the owner in exercising reasonable care does not relieve him of this obligation, of the obligation to furnish a seaworthy vessel and appurtenances reasonably fit for their intended use.

Further, the liability that the ship was unseaworthy does not depend on a showing that the defendant or its employees knew or had reason to know that the conditions relating to the unseaworthy condition about which the plaintiff complains actually existed.

It is not essential to liability on this basis. The fact that the unseaworthiness complained of was of a temporary or transitory condition is also not material.

However, the mere fact that a seaman is injured does not mean that the place of work was unsafe or that his working conditions were unsafe.

Although a ship owner is absolutely liable for failure to provide a vessel that measures up to this standard of the law, that standard is not perfection,

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ladies and gentlemen, it is only reasonable fitness.

An unseaworthy practice, however, does not become seaworthy merely because it's ratified by custom and usage. I have discussed this somewhat before.

The question, insofar as the claim for unseaworthiness in this instance is concerned, is whether or not this ship was reasonably fit for service as other vessels in similar service. The ship owner is not obligated to provide an accident-proof ship. If a seaman is injured in one of the normal hazards of his calling without fault on the part of anyone else, the ship having been found to be seaworthy and not negligent, there is no liability against the ship.

On the other hand, the seaman does not assume the risk of injury arising in whole or in part from the ship owner's breach of his duty to provide a seaworthy vessel. This even so where the seaman works under conditions of obvious danger if the seaman's injuries were proximately caused by the ship's failure to provide him with a reasonably safe place to work.

Now, you must bear in mind that if you find an unseaworthy condition, there is no basis for liability unless you are further persuaded that such unseaworthiness was one of the proximate causes, in whole or in part, of

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the accident complained of, or negligence. You must find, on the other hand, if you have found negligence and proximate cause, as I have previously instructed you.

Also please recall that the defendant has asserted the defense of contributory negligence. Now this defense is equally applicable to the claim of unseaworthiness or to the claim of negligence. Accordingly, if the defendant proves that the plaintiff was contributorily negligent, that is a factor to be considered by way of percentage, as I explained to you, indicating that the portion of fault attributable to the plaintiff in mitigation or diminution of any damages which he might be entitled to should you determine that he is entitled to a recovery.

Of course, if contributory negligence by the plaintiff was the exclusive cause of his injury, then the plaintiff is entitled to recover nothing.

Now I mentioned damages. This of course was gone into in this case. The fact that I speak of damages, ladies and gentlemen, does not indicate whether or not the damages should be awarded. You must first determine the question of liability. If you find there is no liability, then there is no reason to consider damages. In other words the first problem for you to consider, it seems to me, is whether or not an accident of the type stated

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occurred and what was the cause of it, whether negligence or unseaworthiness.

If you find that it has been established by the defendant against the plaintiff in any degree, that is, this situation of contributory negligence, it is a factor to be considered by you, as I have said before. In other words, if you find both the defendant and plaintiff were guilty of negligence which contributed to cause the injury, then it's your duty to reduce the amount which the plaintiff might be entitled to by an amount proportional to the amount or percentage of negligence attributable to the plaintiff.

All of the instructions which I have given you on the issue of burden of proof, fair preponderance of the evidence, credibility of witnesses, and so forth, which I will later speak to you about, apply with equal force to the determination of damages.

In this part of the case the plaintiff must, in the first instance, prove damages by a fair preponderance of the credible evidence, and must establish by a fair preponderance of the credible evidence the nature, the extent, the effect of such damages.

The defendant must respond to all damages flowing from, in natural consequence of the breach of duty to the

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plaintiff, but it's as measured by common experience in the usual course of events. Damages, however, cannot be remote. They cannot be speculative. They cannot be merely conjectural. Your verdict must be based upon the facts of the case determined without bias or sympathy either way and whether or not the plaintiff has proved the necessary elements required.

Damages, of course, are purely compensatory. They are to compensate the plaintiff. They must be neither inadequate nor, on the other hand, excessive. They must bear a reasonable relationship to any harm that the plaintiff is found to have suffered. You may not include in your verdict any compensation for prospective loss which although possible, is merely remote or conjectural, and you may not assess damages for any injury or condition from which the plaintiff may have suffered or may now be suffering unless it has been established by a fair preponderance of the credible evidence that it was proximately caused by this particular accident.

Moreover in assessing damages, you must take into consideration that every person seeking to recover damages which he claims were caused by another is under a legal duty to keep all those damages down to a reasonable minimum. This is known in law as the mitigation of damages.

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The burden of showing that the plaintiff could have reduced or mitigated the damages in anyway is upon the defendant. This, however, does not alter the fact that the plaintiff must carry the burden in the first instance of proving his damages by a fair preponderance of the credible evidence. This means that the plaintiff, as I said a moment ago, must establish the nature, the extent, and the effect of any damages which he claims to have suffered.

In this connection I instruct you that Mr. Porss was and continues to be under a legal duty to reduce his claim for less income by obtaining a job and gainful employment reasonably commensurate with his health, aptitude and ability. If you believe that he has not made any effort to do this, or if his failure to attempt to obtain such work was not due to the injuries already sustained in this accident, then you may not award him any damages for reduction or loss of earnings beyond the date that you determine that he was able to perform such other work.

Any damages which you award for loss of earnings must be based upon what you determine Mr. Porss could have done or can do to carry out this duty rather than by what he has done in the past or what he plans to do in

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the future.

With respect to all these issues, the burden is on the plaintiff to prove by a fair preponderance of the credible evidence that he is now, and in the future will be unable to work as a result of the alleged injuries sustained in this accident.

Furthermore, you may not of course award damages for injuries or harmful bodily conditions of the plaintiff which existed prior to the accident concerned in this case.

Thus the plaintiff is not entitled to recover for any injuries or conditions from which he may now be suffering which were not directly caused or contributed to by this particular accident.

The plaintiff is not entitled to recover for any injuries from which he may now be suffering which were not directly caused or contributed to by this accident.

In no event may the plaintiff recover for any pre-existing condition itself or from any subsequent accident that he incurred.

Now, the existence and extent of the injuries, if any, which proximately resulted from an accident, may not be proved by evidence or statements as to aches, pains, or injuries made to a doctor by a patient in connection

with the doctor's observation, examination or treatment. Such statements are received in evidence only for the purpose of enabling the doctor to tell you everything upon which he may have based any opinion expressed about the plaintiff's physical and mental condition. The opinion of a doctor as to the condition of a patient may be based entirely upon objective symptoms revealed through observation, examination, tests or treatment; or the opinion may be based entirely upon subjective symptoms, that is, revealed only through statements by the patient; or the opinion may be based in part upon, objective in part, and subjective symptoms, to the extent that any opinion testified to by a doctor is based upon subjective symptoms described to him by a patient. The jury may, of course, consider the accuracy of the patient's statements in determining the weight to be given to the doctor's opinion.

Now the plaintiff here in this case seeks to recover for the following types of damages:

One. Past pain, suffering and disability.

Two. Future pain, suffering and disability.

Three. Loss of past wages or loss of future wages.

There is no claim here for past medical and hospital bills for the reason that they were provided by

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the Public Health Service.

Now, with respect to the claim of past and future pain and suffering and disability, the plaintiff, upon satisfactory proof, is entitled to recover a sum which will justly and fairly compensate him for his injuries and for his conscious pain, suffering and disability. Thus you may consider and award the plaintiff a sum which will compensate him for any past pain suffering and disability suffered.

You may consider the credible testimony of the plaintiff himself and the testimony of the physician insofar as you find it to be credible and reasonable. All such damages for pain, suffering and physical disability are merely compensatory and you may not reflect any punitive award, of course, against this defendant.

Now, of course, there is no easy yardstick for these things, but you must consider all of the credible evidence and you must use your common sense in making any award, and only a just award based upon the evidence. It must bear a reasonable relationship to the nature and extent of the injuries arising solely as a result of this alleged accident, after you have determined that there was such and such an accident.

If you find from the evidence that any of the

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plaintiff's injuries are permanent in character, you may make allowance for that in your award, your verdict, to the extent that you think circumstances warrant. In this connection, you will be entitled to take into consideration the period of time that has elapsed from the date of the accident to the present time; and that, I believe, was from June 8, 1971 down to today.

And you may also, as far as future claims are concerned, take into consideration the period that the plaintiff is expected to live; and then, as to loss of wages in the future, the period of time that he has shown he will endure any disability in the future. In other words, I will state that again, if it's just simply the future pain and suffering and disability, you may take into consideration the period that the plaintiff is expected to live from today on, and the period of time that he has shown he will endure any disability in the future.

You will recall that the accident occurred in 1971. The plaintiff is now 46 years of age. As a result, under the table, the mortality table, his life expectancy is a little over 26 years. Now, this life expectancy under the tables comes from a statistical actuarial table. It is not binding upon you. It may be considered by you together with your own experience and any evidence which

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you find concerning the plaintiff's health habits, activities, other accidents, prior injuries, and so forth.

Remember that the mere fact that I mention life expectancy is no indication that you should make allowance for permanent injuries. The period of work expectancy is to the age of 65 years and any award for that must not exceed the period from now, when he is 46, until he is 65, in other words 11 years, I think.

Any award for loss of earnings must be based on the amount of earnings the plaintiff has lost as a result of the alleged accident. In order to make any award, you must determine that plaintiff has proved by a fair preponderance of the credible evidence that:

One. The plaintiff was unable to work for such and such a period.

Secondly. That such disability to work was proximately caused by the accident.

Now, any award for lost earnings may not be based solely on conjecture; rather, within the framework of what is shown by a fair preponderance of the credible evidence, you must determine if lost earnings based upon the plaintiff's age, his competency, his experience, his capacity and his earnings before the accident, and his efforts to secure compensatory employment.

The plaintiff also claims loss of future earnings. As to this claim, you should first consider whether plaintiff's disability will in fact continue. Plaintiff must show by a fair preponderance of the credible evidence that such prospective loss of wages is reasonably certain, not merely possible, and in that respect it is different from past, lost wages or past, pain and suffering.

The plaintiff must show by the preponderance of the credible evidence that the prospective -- the future loss, is reasonably certain, not merely possible.

As to any future loss of wages, any testimony of plaintiff is of little if any value since he is not qualified to state his future inability to work because of the accident. It is largely a question of medical testimony as to his future inability to work.

The life expectancy I mentioned.

The work expectancy is 65.

This working-life expectancy is merely a statistic of the United States Department of Labor, an estimate of the probable remaining work expectancy of persons of a given age, and so forth. It is an estimate that is based upon a limited record of experience. Hence, an inference which may be shown is that this estimate applies only to one who has average health and exposure to danger, and so

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forth. You will have to determine whether or not his would be any different.

In determining the reasonably certain working life expectancy of the plaintiff, you should consider all other facts and circumstances in evidence bearing upon the working life expectancy of this plaintiff, including his occupation, habits, past health record and present state of health.

With these general instructions as to the applicable law, unfortunately somewhat lengthy, I approach a consideration of some of the facts in this case. Please bear in mind that this is only my recollection and what I may say or counsel may have said is not to be taken in place of your own recollection of the facts in evidence subject to a refreshment in the manner in which stated. It is your duty to consider all the testimony given by all of the witnesses and the proof submitted in the exhibits. The fact that I advert to certain testimony and may not refer to other testimony, does not mean that any testimony whatsoever should be disregarded.

First the plaintiff's case. The plaintiff testified in substance as follows:

He was an able-bodied seaman on board the SS OVERSEAS ALEUTIAN, owned by the defendant, on June 8, 1971.

Under the prior directions of the bosun he, together with George Schmidt, an able-bodied seaman, and another man, a deck maintenance man called Frank Wherrity, I believe, were cleaning a tank on board this vessel by means of a process called "butterworthing."

The plaintiff, Leroy Porss, testified in substance as follows:

He was an able-bodied seaman on board the SS OVERSEAS ALEUTIAN, owned by this defendant shipping company. Under the prior directions of a bosun he, together with George Schmidt, an able-bodied seaman and another man, a deck maintenance man named Frank Wherrity, were cleaning a tank on board the vessel by means of this process called "butterworthing" which you have described.

The plaintiff said that the other two men abovementioned were working with him but that they let go of the rope to which was attached the butterworthing machine. I think the machine is right down on the floor here.

I will read that again:

"Plaintiff said that the other two men abovementioned were working with him. They let go of the rope to which was attached the butterworthing machine and he was pulled forward and injured his back.

"He visited one of the Public Health hospitals in New Orleans. Later he came back to New York and went

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for outpatient treatment at this Houston Street clinic of the United States.

"After leaving the defendant's employ, plaintiff said that he signed on on the vessel LONGVIEW VICTORY in November of '72 with which he remained until March of '73. The log of the LONGVIEW VICTORY shows the following:

"That the plaintiff sustained some thumb injury in January aboard this vessel; that plaintiff left the LONGVIEW VICTORY in March '73 with a master's certificate which recited that the plaintiff complained of his left-side chest pains."

You may look at the exhibit which I will refer to later.

There is some testimony, some references to hospital records to the effect that he had certain other physical defects as follows: chest pains and prostatitis.

Now the hospital records of the New Orleans hospital and the clinic outpatient records of the Houston Street clinic were offered and received in evidence. I refer you to these exhibits, and my personal opinion is that you should examine these records in connection with any physical injuries or damages of that sort.

In the deposition of Angelo Antoniou, who was a bosun on the OVERSEAS ALEUTIAN, he testified that he

had been going to sea since 1930; that about 18 years of this period he served as a bosun. He had served six years as such prior to 1970 on tankers. He explained the duties of a bosun. He was in charge of the deck hands on the OVERSEAS ALEUTIAN.

From January 6 to July 9, the vessel had 15 tanks, three center tanks and five tanks on each side. He explained this process of butterworthing.

Butterworthing takes it's name from the butterworth machine which is lowered into the tanks after the cargo is discharged. These machines have two rotating nozzles which pump out hot sea water heated just under steam temperature, into the tanks.

This witness, Antoniou, said the butterworthing machine weighs approximately 20 pounds and had a rubber hose 65 feet long connected with the machine.

Actually, according to the testimony of Albert Isaac, a marine expediter who had visited the OVERSEAS ALEUTIAN and had examined the tank, and who brought with him a similar machine used in butterworthing, said that the weight without the hose was 35 1/2 pounds. He said that 75 feet of hose would not weigh more than 113 pounds.

The bosun explained the way in which the work was done in the tanks and how the machines were lowered

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and how they operated.

That day the plaintiff, George Schmidt, an able-bodied seaman; and a deck maintenance man, Frank Wherrity; were on the job.

Albert Isaac stated that the center tank was the largest one and those on the side were some one or two feet smaller. He explained the process utilized when the hose was being let down and when it was being taken up. Three men, he said, pulled the machine up. The man in the center gets the hose in one hand and the line in the other hand. One man stands at each side of this machine. They help him pull it up. One man gets the hose in his hands and the other has the line. The line is about 2 1/2 inches in diameter and is made of manila and is actached to the machine. He testified that he could pick up one of these machines in each hand.

After the valve is shut off to the hose, they wait three or four minutes to drain the water from the tank. It is drained while they are pulling up the machine. There may be one or two pounds of water he said -- perhaps a gallon.

He saw no accident on the night on which plaintiff claims to have been injured. No one of the three men working there mentioned anything about an accident.

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At one time while operating a butterworthing procedure, the plaintiff told Antoniou, "My back hurts me." This was about 9:30. However, plaintiff continued to work for the rest of the time.

When Antoniou asked the plaintiff, "How come your back hurts?" plaintiff merely said, "My back hurts me."

The next day he sent a man around to wake up the plaintiff for his watch at 8:00 o'clock. The man came back and told him the plaintiff said his back bothered him. He went back to his quarter and he saw plaintiff lying on the bed. He reported to his chief officer that the man claimed to be hurt but that he did not see him get hurt.

Antoniou said that the plaintiff was as tall as he, about 5-8; weighed about 160 pounds. He saw no mark on the plaintiff's face as he remembered it.

The work of butterworthing was done by the three men above mentioned: Antoniou described Schmidt and Frank, the deck maintenance men. Frank, he said, weighed about 137 to 140 pounds and was 5-6 or 5-7 inches tall.

I shall read you a short excerpt from the deposition of Antoniou.

Question of Antoniou:

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"Q While you were there, did you -- during this time that Mr. Porss was working for you, did you see any accident?

"A No, sir.

"Q Did you see anyone injure themselves?

"A No, sir.

"Q Did any one of the three men mention anything about an accident?

"A No, sir.

"Q Did the men rotate the jobs?

"A Not exactly. I have to tell them they are supposed to take turns. Each man everytime pull the machine up. You can't do one man being in the center all the time. The next man gets turn, the other man gets a turn, so I have to do the most time myself. When we are resting time we sit over there and I have almost half-an-hour.

"I saw this man was walking back and forth, so I called him up and I say, 'Come over here. Sit down. You don't have to walk back and forth. I want to explain to you something how we can operate here so you can get in down there and lift that machine up once in a while.'

"He turned around and say, 'My back hurts me.'

"Q Who was this man?

"A That was Leroy Porss.

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"Q About what time was that?

"A That was 9:30."

I think that's all of his deposition which may be pertinent.

Plaintiff also read portions of the deposition of George Schmidt, the able-bodied seaman who was working on the butterworthing job. He contributed some answers to the way in which the butterworthing was being done. He said that the man in the center would bring up all the slack and the men on each side would hold the slack. The line is manila rope. The man in the middle is the one who pulls the hose up through an opening called the butterworth opening which is about, I think he said, 16 inches in diameter. The man in the center would bend over the hole reach down with both hands, grasp the line with one hand and with one hand grasp the hose and take up as much from the tank as was possible with one stroke. There was this union rule which was in the agreement with the vessel that three men were necessary.

And the question:

"Q I have told you, have I not, Mr. Schmidt, that Leroy Porss claimed that while engaged in lifting the butterworth hose from one of the tanks on the ship on June 8, 1971 that you and Mr. Francis Wherrity both, during

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the lifting operation, suddenly let go both the hose and the line, causing him to bear full weight of the hose and machine. Did that occurrence happen?

"A No, it never did happen."

And again:

"Q At anytime during the voyage in early June 1971 were the butterworth hose and machine raised or lowered without the bosun being present?

"A No."

George Seaman, the orthopedic surgeon whose qualifications you heard, testified for the plaintiff. Dr. Seaman said that he examined plaintiff on April 14, '72 and his diagnosis was that the plaintiff had acute chronic lumbosacral complaints.

He read various portions of the hospital records. Each and every one of these hospital records will be available to you for your examination while you are deliberating.

I shall not attempt to review them and I must advise you that I believe you should study those and seek to answer those questions.

Dr. Seaman stated that in his opinion it was reasonably certain that the conditions which he diagnosed would continue in the future.

He also testified that plaintiff's prostatitis

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had no relationship to the lumbosacral condition.

Then for the defendant, Dr. Vincent Lodico, an orthopedist and surgeon, testified. He said that he had examined the plaintiff on October 7, 1974; that he found in substance no abnormalities of any kind.

It is my belief -- I am speaking for the Court -- that if you examine the hospital records, you will see whatever existed therein in favor of the plaintiff as well as the considerable areas which indicated the extent of any difficulties which the plaintiff had and which the defendant contends were substantially less than plaintiff claims.

There are certain parts of these areas which may be stated to show, in which the plaintiff claims to show prior conditions of difficulty with respect to the back as well as other conditions.

So much, members of the jury, for my resume. Remember that it's your recollection, of course, that must prevail. Yours may be, as I said, refreshed by the readings. If I have mentioned certain things and have omitted to mention others, there was no intent on my part whatsoever to emphasize or to minimize. It is your duty to consider all of the testimony given by all of the witnesses.

If I, perchance, made any reference to the

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testimony in this case which does not coincide with your recollection, you are to have no hesitancy in disregarding such reference by me, and of course, relying on your own, refreshed, as you may see fit, by reading. No statement by me is entitled to any way influence your judgment. As I have stated, you are the sole and the only judges of the credibility of each and every witness, as you are of the facts.

Now, how do you determine the proof and appraise the credibility of witnesses? Well, you have to use your own every day common sense. You saw these witnesses on the stand, and you can determine, I believe, from the nature of their testimony, something, at least, as to the credibility.

You may ask yourself: How did this witness or that witness impress you. Did this witness appear to be testifying frankly, candidly and with the degree of credibility which should be given a witness's testimony, which may be determined by his conduct and manner of testifying, and by his relationship or interest in the matter of the controversies.

You, obviously, make take into consideration the interest which a witness has in the outcome of the case. The plaintiff, of course, is interested.

You may consider the employment, present connections, or the prior connections of any of the present or former employees.

In other words, ladies and gentlemen, you have to apply to this test of credibility your own good common sense again, your everyday experience. You act exactly as you would in your own affairs when you are called upon to make or reach an important decision.

If any witness, in your opinion, has willfully testified falsely to any material fact, you may disregard all his testimony or you may accept such part of it as you believe worthy of belief.

Now, a word about expert witnesses. Expert witnesses give their testimony based upon their own professional experience and judgment. The weight to be given to the testimony of an expert is governed in the same manner generally as that of other witnesses; that is, by applying good ordinary, everyday common sense. You apply the same standard as you would in the case of other witnesses.

You must remember with respect to the expert, the party offering such testimony must show by a fair preponderance of the credible evidence that these opinions are probably true. You must also remember, as I have already indicated, I believe, that the opinion of the

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expert must be based upon credible factual evidence in the case.

The opinions of medical experts are only advisory and they are only so if the facts assumed by the doctor were correct. Consequently, if you find that either Dr. Seaman's testimony of Dr. Lodico's testimony was based upon erroneous assumptions of fact, you must reject this opinion. E. g., apparently Dr. Seaman was assuming, I believe, that the weight of the butterworthing machine and the hose was 300 to 500 pounds. Actually, on the other hand, the testimony of Isaac was that the machine which is down on the floor there, was only 35 1/2 pounds and the hose I believe was about 60 or 61 pounds. Obviously, with this discrepancy you must consider the effect on the testimony of the expert.

Now, you came into this jury box a few days ago and you came in without any, I believe, preconceived views, ideas or opinions concerning the rights of either of these parties. What you now know about this case should have been learned only from the witnesses on the witness stand, from the exhibits in evidence, and from any portions of depositions read into evidence.

Your determination of the facts here must be based upon only such evidence. Each of you is entitled to

your own opinion, but you are expected and you are required, when you deliberate, to exchange views with your fellow jurors and then to discuss and to consider the evidence and listen to the arguments and reasonings of your fellow jurors, to present your own individual point of view and to reach an agreement solely and only on the evidence and without violence to your own judgment.

You are not to yield, e.g., simply because you are outnumbered. You should vote with the others only if you are convinced on the evidence and the law, that is the correct way to decide the case. On the other hand, you should not hesitate, if you are convinced by a fellow juror, to change your point of view if it appears to be erroneous to you.

To return a verdict here in this case, it must be unanimous. I have prepared a special verdict and I will ask the clerk to hand the original to the forelady and with copies to the other five jurors. I believe, members of the jury, that this special verdict is clear and self-explanatory. However, if any one of you has a question, let the question be written out and signed by the forelady and sent in to the Court through one of the deputy marshals.

The special verdict must be considered only

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pursuant to the instructions which I have given you this afternoon. On each of these questions all six must agree. Then the only paper to be signed is the original which is in the hands of the forelady.

Now, you have here various questions: You have a claim that a certain thing happened. The plaintiff claims so-and-so. You must first consider whether or not that happened.

Secondly, you must consider my instructions with respect to what is necessary to show negligence or what is necessary to show unseaworthiness.

And remember the application in both instances, both under negligence and unseaworthiness, of the requisite of showing that the condition which was complained of and which you may or may not sustain, was a proximate cause.

Now that must be done. When you get to your damage questions, you will deliberate on the basis of the facts as shown and only the facts which are shown, giving heed to the opinions of the doctors insofar as you believe that their opinions are reasonable and in case they are based upon other facts, as to whether or not their opinion was based upon the facts which did occur.

I think this completes the instructions which I give you. You are to retire in a few moments, and after

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you have rendered your verdict, you have no obligation to talk to anyone about what you did, or how you stood, or anything of that sort. And although I don't order it, I recommend that you don't talk to anyone about what you may have done.

I will meet the lawyers in the robing room if there are any exceptions.

(In the robing room.)

THE COURT: Mr. Goldstein, no requests, but exceptions.

MR. GOLDSTEIN: Yes, I have exceptions. I have exceptions as to the summarization of the facts that your Honor made, in that they were totally one-sided, totally in favor of the defendant; the concept of burdens of proof upon the plaintiff, never once talked about the burdens of proof upon the defendant.

THE COURT: There is none on the part of the defendant.

I have noted your exception. Proceed to the next one.

MR. GOLDSTEIN: Your Honor stated -- your Honor speaks with your head down. You don't look at the jury; your voice drops. The jurors complained that they couldn't hear.

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THE COURT: Yes, and I spoke up, counsellor.

MR. GOLDSTEIN: The clerk had to tell you to raise your voice.

Your summary of the facts were absolutely prejudicial to the plaintiff. I was embarrassed for them and embarrassed for you.

THE COURT: Very well. I have noted your exception.

MR. GOLDSTEIN: I have more exceptions.

THE COURT: All right, state them.

MR. GOLDSTEIN: Your Honor's statement of mitigation of damages is incorrect.

THE COURT: It is not incorrect.

MR. GOLDSTEIN: That is my opinion, sir. You are entitled to yours and I am entitled to mine.

THE COURT: I don't agree with you. It's noted.

MR. GOLDSTEIN: Your Honor did not state anything about numbers of witnesses. Your Honor didn't talk about the quality of the witnesses.

Your Honor mentioned that the life -- the work expectancy of the plaintiff is 11 years whereas it's 19 years, since the plaintiff is 46, and your Honor stated that if he should work until 65 --

THE CLERK: It was 19 years, Judge.

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MR. GOLDSTEIN: You stated 11.

THE COURT: I will rectify that. That was an inadvertent error, counsellor.

MR. GOLDSTEIN: Your Honor stated or took the defendant's view in reading both depositions. Your Honor did not play fair with the plaintiff in your determination of the facts.

THE COURT: I told --

MR. GOLDSTEIN: May I put my exceptions on the record?

THE COURT: Go on, counsellor.

MR. GOLDSTEIN: Thank you, sir.

Your Honor read two depositions, both of the defendant's witnesses, and your Honor deemed it necessary only to read the areas of the depositions of both of those men, that there was no accident. This is wholly one-sided, unfair and prejudicial to the plaintiff.

Number two: As a result of what I consider an absolute disgrace in terms of a charge to a jury, I asked --

THE COURT: You don't need to say anything personal.

MR. GOLDSTEIN: I intend to.

THE COURT: All right, say it.

MR. STEARNS: I will now ask--Mr. Goldstein is

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shouting -- the jury is outside and I would ask him not to shout.

THE COURT: Calm down.

MR. GOLDSTEIN: I intend to make a record for the circuit court and finish this type of charge up once and for all.

THE COURT: Listen, I don't accept any threats from you and I think you are close to contempt, by speaking in that respect.

MR. GOLDSTEIN: I am disgusted by what I heard out there.

THE COURT: I don't care whether you are disgusted. Just cite your exceptions and stop raving on.

MR. GOLDSTEIN: Yes, raving on.

THE COURT: Well, that's what it is when you shout.

MR. GOLDSTEIN: Your Honor said and read one area where Schmidt said "grasp." In point of fact--and I don't know the page that your Honor was reading because your Honor didn't give us the courtesy of telling us what part of the depositions you were reading from--in point of fact, Schmidt's almost entire testimony was to the effect that he never gripped and that you weren't supposed to grip, the middleman. You were supposed to cradle the hose

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and not grip it. Your Honor used the word "grasp."

THE COURT: Go ahead and state your exceptions.

MR. GOLDSTEIN: Your Honor used the word "grasp" and that word "grasp" is wholly misleading to the jury.

THE COURT: All right, are you through now?

MR. GOLDSTEIN: No, sir.

THE COURT: Go right on.

MR. GOLDSTEIN: I object to the concept of your Honor refusing to allow me to charge on the question of inflation.

I object to the failure of your Honor to state to the jury at anytime, that the negligence of the defendant could be in any degree. Your Honor used --

THE COURT: I said "in whole or in part" --

MR. GOLDSTEIN: Yes.

THE COURT: -- "no matter how large it was."

MR. GOLDSTEIN: Your Honor used it once and your Honor's voice dropped to a whisper at that point.

MR. STEARNS: I object to that. That's absolutely misleading and untrue and deliberately so.

MR. GOLDSTEIN: That's the question.

THE COURT: Finish up your exceptions so we can get this case to the jury.

MR. GOLDSTEIN: Your Honor, by actual count,

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mentioned the burden upon the plaintiff to prove his case by a fair preponderance of the credible evidence ten times by actual count. Each time your Honor mentioned it I marked it down, and I now have two lines of five notes; five notes each: ten times. I think that that's unfair and prejudicial and totally one-sided, as I think the remainder of the charge was.

THE COURT: All right. Mr. Stearns, anything?

MR. STEARNS: No exceptions.

THE COURT: All right. Here we go then.

(In the courtroom.)

THE COURT: Members of the jury, I wish to correct one misstatement which I made inadvertently. The life expectancy, instead of being 19, is 26 years. The work expectancy is 19 years. That's the change.

You may now retire, and will counsel consent that all of the exhibits be handed to the forelady now.

MR. STEARNS: Yes, sir.

THE COURT: Mr. Goldstein.

MR. GOLDSTEIN: Yes, sir. Your Honor did not ask us if we had any further requests to charge. Your Honor only asked us --

THE COURT: I don't have to, counsellor. That time is past.

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I will ask the clerk to take the exhibits. There is only one exhibit which I don't think you need to take. You have seen it. You may ask for it if you want it.

The alternates are excused. You may get your hats or coats and your effects and you may go. Come back tomorrow morning at 10:30. There is no use of holding them.

MR. STEARNS: They may be beyond two weeks. They may not have to come back.

THE COURT: I suppose that's probably true. I couldn't substitute them after the deliberations commenced.

MR. STEARNS: No, but --

THE COURT: Do you object if I discharge the alternates?

MR. GOLDSTEIN: No, sir, I do not.

THE COURT: All right. You are now excused. Go back down to the central jury room now.

MR. STEARNS: And then they are finished.

THE COURT: I want the clerk to read on the record the exhibits which are being given to the forelady.

THE CLERK: Plaintiff's Exhibit 2, 3, 4; Defendant's Exhibit A, C, D, E, I, J, K.

THE COURT: Very well.

(The jury left the courtroom. Time noted: 3:05 p.m.)

* * * * * * * * *

THE COURT: Now, we have a certain note. I don't think I need to read it to you. The gist of it is that they have received -- they cannot agree on a certain part and they have agreed -- they are just distinctly violating what I told them not to do, so I am simply going to call them in, gentlemen, and tell them to go back and deliberate further; and I am going to give them a certain information which I give from a certain case which is approved from an appellate court. This is not the Allen charge, but it is -- I will give it when they come in. Bring them in.

(Jury present.)

THE COURT: Now, Madam Forelady and members of the jury, I have your note, and I will ask the clerk to

mark it.

(Note from jury marked Court Exhibit 7.)

THE COURT: It is not to be revealed, but you did what I think I told you not to do. You told me how you stood, so and so.

That was unnecessary, and I regret it.

However, since you still have not agreed, I am going to ask you to return, deliberate further on the areas on which you have heretofore not reached an agreement. I want to make a few remarks about that.

Now, this, of course, is an important case, both to the plaintiff and to the defendant. It was an expensive case. It costs money to present it, and it will cost money if it is retried.

Obviously, it is normal for jurors at times to have differences. This is fairly common. Frequently, jurors, however, after more extended discussion, may find that a point of view, which originally represented a fair and considered judgment, might yield upon the basis of argument on further discussion and upon a further review of the facts and the evidence.

Remember also, and I emphasize this, that no juror must vote for any verdict unless after full discussion, consideration of the issues and exchanges of views,

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this represents his or her considered judgment. Frequently further consideration, as I have just indicated, may show that a change of original attitude is fully justified upon the law and the facts.

To aid you I quote in part from a Supreme Court opinion:

"Although the verdict must be the verdict of each individual juror, they should listen with a disposition to be convinced of each other's argument. That if a much larger number were for one phase -- one party, a dissenting juror should consider whether his doubt was a reasonable one, whether his belief was a reasonable one which made no impression upon the minds of other persons equally honest, equally intelligent as himself or herself.

"If, on the other hand, the majority are for another party, the minority ought to ask themselves whether they might not reasonably doubt the correctness of the judgment which was not concurred in by the majority."

That sets forth the viewpoint that you may well consider, but please remember that you review the evidence and you vote finally according to your conscientious judgment.

You may now go back to the jury room for further deliberation.

(Jury retired to deliberate further)

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(Time noted: 3:09 p.m.)

THE COURT: I will ask the lawyers and the reporter to come in the robing room for a minute.

(In the robing room.)

THE COURT: All right, gentlemen, I want to ask a very simple question and I want you to give me a simple answer. Will both of you, each of you, agree to a five to one verdict?

First, Mr. Goldstein.

MR. GOLDSTEIN: No, sir.

THE COURT: What's that?

MR. GOLDSTEIN: No, sir.

THE COURT: Well, there is no reason asking you, counsellor.

Very well, go back and sit.

I want to say on the record, I am not inclined to discharge the jurors today, but I shall expect a little before 5:00 to send them home as I did on, I believe it was, Thursday afternoon.

So be it.

(Recess.)

(Time noted: 3:26 p.m.)

THE COURT: For the record, I feel that I must have confused the jury by possibly giving them the

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impression that they must answer all unanswered questions. I am going to call them in and tell them they must answer the questions as instructed. That is all I am going to say.

All right, get them in here.

(Jury present.)

THE COURT: Madam Forelady and jurors:

I called you back because I fear I may have confused and possibly misdirected you. You are called upon to answer questions, but you do not necessarily have to answer the questions in the second group. That depends on what you have done with the questions in the first group.

THE FORELADY: We understand that.

THE COURT: And you must follow the instructions. I think if you will read the instructions after the first -- each of the first three, you will understand me.

Thank you for coming back, and you may return.

(Jury retires to deliberate at 3:29 p.m.)

(Time noted: 4:29 p.m.)

THE COURT: Another note. What they say is that they are hopelessly deadlocked.

I still ask you once more, Mr. Goldstein, first, if you will take a five to one verdict.

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MR. GOLDSTEIN: I have to think about it, Judge.

THE COURT: How long do you want to think?

MR. GOLDSTEIN: Five minutes.

THE COURT: How about you, counsellor?

MR. STEARNS: I am presently inclined to take it, yes.

THE COURT: There you are.

MR. GOLDSTEIN: I want to make a telephone call, Judge.

THE COURT: All right, go ahead, but don't make it long.

(Recess.)

THE COURT: Well, counsellor?

MR. GOLDSTEIN: Judge, I won't take a five-one.

THE COURT: What is it?

MR. GOLDSTEIN: No, I still hold out for the six one, unanimous verdict.

THE COURT: All right. I am going to send them home. Hold them for further deliberation.

Bring the jurors in here.

MR. GOLDSTEIN: Will your Honor ask them to --

THE COURT: What is that?

MR. GOLDSTEIN: Will your Honor ask them to start at 10:00 o'clock tomorrow?

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THE COURT: Yes, of course.

MR. GOLDSTEIN: Well, your Honor mentioned 9:30 today. I have a pre-trial conference.

THE COURT: At 10:00 o'clock it will be.

MR. GOLDSTEIN: Fine. It's Judge Gagliardi tomorrow, Judge, at 9:30 for me.

(Jury present. Time noted: 4:40 p.m.)

THE COURT: Now, Madam Forelady, I don't wish to ask how you stand, and I don't wish you to tell me. However, I assume, since I have heard no word, that there is no verdict yet. Accordingly, however, I suggest that you return tomorrow morning for further deliberation. Come here at a little before 10:00 tomorrow morning.

THE FORELADY: Excuse me, sir. Did you get the note we just sent out?

THE COURT: I have your note; yes.

THE FORELADY: We have been at this since yesterday afternoon.

THE COURT: What is that?

THE FORELADY: We have been on the same subject, the same --

THE COURT: Well, whatever it is, whatever is open, you deliberate on that. Whatever it is, see if you can't come to a --

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THE FORELADY: We have tried.

THE COURT: I know. I understand that, but I want you to try a little longer.

Come back tomorrow morning; and the same instructions as I gave you yesterday, overnight.

(Adjournment at 4:42 p.m.)

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LEROY PORSS

-against- 72 Civ. 1600

MARITIME OVERSEAS CORPORATION

April 16, 1973
10:00 a.m.

(In the robing room.)

MR. STEARNS: I have an application.

In view of the fact that there was an offer of Francis Wherrity's statement which was made by Mr. Goldstein during his trial of this case, there was a ruling against him.

THE COURT: You objected to it?

MR. STEARNS: I did, sir. There was a ruling against him. And then, dispite the Court's ruling, he proceeded to get up in his summation and say, "I offer this statement." It's their statement. They won't let me put this statement in evidence.

THE COURT: Did you say that, sir?

MR. GOLDSTEIN: Judge, I really can't recall the exact words that I used.

THE COURT: I direct the reporter to look in the summations and see if that is done. That, of course, was outrageous; I will say that, counsellor.

MR. STEARNS: Your Honor, in view of that I would

move respectfully to reopen the record and offer in evidence the statement of Wherrity.

THE COURT: Well, that's something else. It will wait.

* * * * * * * * * * *

(892)

THE COURT: All right. Now, this morning, after

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a while, I am going to call the jurors in and I am going to ask them if they still disagree, and if they say they do, I propose to declare a mistrial.

MR. STEARNS: Your Honor, before you do that, may we please -- may I please, in view of the comment of counsel -- the second offer in front of the jury during summation -- may I please be permitted to introduce this statement in evidence which, of course, Mr. Goldstein can have no objection to since he offered it himself twice.

THE COURT: Do you object to that?

MR. GOLDSTEIN: Yes, sir.

MR. STEARNS: May I offer this statement in front of the jury and let him, before this jury, refuse to have this statement in evidence? There is nothing improper about this, your Honor.

MR. GOLDSTEIN: It absolutely is improper.

THE COURT: I want to find out what was done about it, first in the summation; and secondly, in the record at the trial.

I will tell you this: Inasmuch as this jury has served not only two weeks but two or three days this week, they are beyond their time; is that right, Mr. Farley?

THE CLERK; Yes, Judge.

THE COURT: And I think it might be unfair to

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hold them. So, if the maintenance and cure is to be tried now, then I think that there should be a new panel with a selection made, and if it's to be tried, I assume--and tell me if I'm wrong -- I assume that each side will consent that all of the hospital records be admitted in the main trial and be deemed in evidence.

MR. STEARNS: Your Honor, we cannot try and I herewith object to a trial of the maintenance case without submitting it to the same jury. There has been a lot of medical testimony --Dr. Seaman and Lodico -- about the man's condition, about the man's condition during various periods of time.

THE COURT: You heard me say that it might be unfair to the jury to keep them. Now, do you want to keep them? Is that your insistence?

MR. STEARNS: My insistence is one, that the same jury who hears the main case, hear the maintenance case; two, that if the jury is deadlocked on the maintenance case that the issue of maintenance and cure not be submitted to them.

THE COURT: Well, it could be submitted and I could declare that it should be submitted to another jury chosen. That's under 46(b).

MR. STEARNS: Yes, sir, but this would require

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recalling two doctors.

THE COURT: Well, I can adjourn the trial of the maintenance and cure case until the retrial of the main case.

MR. STEARNS: That is what I would respectfully request. This is the very tail end. It will be very brief in any event, whether it's with this jury or a later jury; but I think the important thing here is -- and I would ask that Mr. Barron please review his notes on the summation -- and Mr. Goldstein made great issue of this statement before the jury after the Court had ruled, and in view of that, I now offer the statement in evidence, and I think if the statement --

THE COURT: This hasn't been marked, even, for identification, has it?

MR. STEARNS: It has not, but it's also annexed to the answers to interrogatories and it's exactly the statement --

THE COURT: Did you offer it during the trial?

MR. STEARNS: I did not, sir. I objected to it then and my objection was sustained. He offered it during the trial of the case. He proposed first to read from it.

THE COURT: Can you pinpoint the time at all? Was it during somebody's testimony?

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MR. GOLDSTEIN: It was during the time that I read the answers to interrogatories.

MR. STEARNS: There is no dispute. Mr Goldstein agrees, I think, that he attempted to read the statement of Wherrity as part of the answers to interrogatories. I objected at that time.

MR. GOLDSTEIN: And your Honor sustained the objection.

MR. STEARNS: Right. Despite the fact that the objection to the statement had been sustained during the summation, Mr. Goldstein, in an emotional moment during his summation, said "I have this statement. I have offered this statement. It is the defendant's statement."

THE COURT: All right. Let the reporter go out and sit down and see if he can find the part in the summations wherein allegedly, according to Mr. Stearns --

MR. STEARNS: Is there any dispute, Mr. Goldstein?

MR. GOLDSTEIN: There is a lot of dispute.

THE COURT: Well, now, stop talking about it. I have directed this. Now go and do it.

MR. GOLDSTEIN: Your Honor allows him to talk. I can't get a word in edgewise.

THE COURT: I didn't know you wanted to, counsellor.

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MR. GOLDSTEIN: Well, I assumed --

THE COURT: Everyone has to be heard on it.

MR. GOLDSTEIN: I assumed that I was supposed to wait until Mr. Stearns finished.

THE COURT: Wait a minute. I want to say this: If you have any objection to Mr. Barron looking for this, I shall overrule it.

MR. GOLDSTEIN: I do have an objection. I have an objection to this entire procedure. I have an objection to this statement being put in at this time after --

THE COURT: That's another thing. I'm not saying about that. I don't see how you can have any objection to the reporter looking for it.

MR. GOLDSTEIN: Because, your Honor, what Mr. Stearns fails to tell your Honor is that after I made some mention of that--and I don't remember my exact words--your Honor told the jury to disregard it.

THE COURT: All right. Let the reporter find that area and come back and read it.

(Pause.)

THE COURT: The reporter will read, please, the area, of the summation by Mr. Goldstein, in question.

(Record read.)

THE COURT: Let me say that that was definitely

an improper remark in the course of your summation.

Now, on the other hand, this statement -- Francis Wherrity's statement, I don't have any number on it, Mr. Stearns, and as I recall it -- did you ever offer it?

MR. STEARNS: No, sir, I did not.

THE COURT: All right. Then I cannot grant your motion to submit this to the jury now.

MR. STEARNS: May I --

THE COURT: Wait a minute. It's denied.

Now, what more do you want to say?

MR. STEARNS: I understand. May I be permitted, in view of the absolute prejudice that Mr. Goldstein engendered by improperly re-offering this statement during his summation to which I had no reply, in persisting, during his summation, after he had been instructed --

THE COURT: What do you want me to do?

MR. STEARNS: I want you to call the jury back. I want to get up and offer the statement of Mr. Wherrity and I want to have Mr. Goldstein, if he wants to, to have him say no.

THE COURT: No, I feel I shouldn't, I cannot and I will not do that and that.

MR. STEARNS: I will say that --

THE COURT: Wait a minute. Won't you please.

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I want to speak once in a while and not be interrupted.

That may be some reason for a new trial as far as you are concerned. That's about all it is. It's a thing, Mr. Goldstein, that if there were any attention paid to contempt charges, would be ground for contempt, counsellor. I will tell you that right on this record. They don't pay any attention. In effect, the Supreme Court and the courts of appeal of this country have abolished contempt.

* * * * * * * * * * *

(908) THE COURT: And lastly, I will say that they must disregard any reference by counsel in the summation to the statement of Wherrity.

Now that's it.

MR. GOLDSTEIN: Judge, you have already stated

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that to the jury. Why should your Honor raise that again? Your Honor stated it --

THE COURT: Well, I shall refer to it then. I shall say as already stated, so and so. I am going to say that much because of this difficulty.

All right, gentlemen. Get the jury.

(In the courtroom.)

(The jury entered the courtroom. Time Noted: 10:50 a.m.)

THE COURT: Madam Forelady, I received your note. I have been trying to get the information together from various sources.

In the record, now, as to the dates that you mentioned, 1967 through 1975, there is no evidence, so I cannot get you anything.

Now, as to the other features about which some evidence has been collected, I have a statement prepared with the consent of both sides, and the Court Exhibit 9, which I will hand to you which tells when the dates were, on which the plaintiff worked.

The third thing is this: I should read Questions 6 and 7 and the answers thereto from the interrogatories. These were interrogatories propounded by the plaintiff to the defendant.

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No. 6 question is: "State the rating of the plaintiff aboard the vessel and his monthly rate of earnings, both base and overtime."

No. 7 question is: "Set forth the total base and overtime wages earned by the plaintiff during the voyage involved herein, and in addition thereto, annex a copy of the earnings sheets and wage vouchers."

Now I will read the answer.

No. 6: "AB, base pay $506.41 per month; overtime $3.44 and $4.01 per hour.

No. 7: "Base pay $101; overtime $47.57."

I stated that I have already given you the testimony of the plaintiff about the $500 per month.

MR. GOLDSTEIN: Your Honor did not.

THE COURT: All right, I will do it now, then, counsellor.

$500 was the regular, so he said; and $400 the overtime. It's in the answer anyway.

Now lastly, I merely restate what I said during the course of the summation by plaintiff's counsel: that you are to disregard any reference to the statement of Wherrity. That was not admitted into evidence.

Now I shall hand, then, Court Exhibit 9 to you. That's all I think I have to give you. I have read the

answers to the interrogatories. I have told you about the testimony of the plaintiff, and that's it.

You may retire.

(The jury left the courtroom. Time noted: 10:55 a.m.)

(The jury entered the courtroom. Time noted: 11:50 a.m.)

BY THE CLERK:

Q Madam Forelady, have the jurors agreed upon a verdict?

A We have.

Q How do you find to Question No. 1?

A No.

Q How do you find to Question No. 2?

A Yes.

Q How do you find to Question No. 3?

A No.

Q How do you find to Question No. 4?

A No.

Q How do you find to Question 1A?

A Yes.

Q How do you find to Question 1B?

A $8500.

Q How do you find to Question No. 2A?

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A No.

Q How do you find to Question No. 3A?

A Yes.

Q How do you find to Question 3B?

A $16,500.

Q How do you find to Question 4A?

A No.

Q How do you find to Question 4B?

A We didn't answer 4B because it's --

THE COURT: Well, you have to answer it.

A It's not contingent on that.

Q How about C?

A C is on the same basis, contingent on 4A.

THE COURT: They don't have to answer 4B or C then.

Q Ladies and gentlemen of the jury, listen to your verdict as it stands recorded:

You say you find to Question No. 1 a verdict of no.

To Question No. 2, a verdict of yes.

To Question No. 3, a verdict of no.

To Question No. 4, a verdict of no.

To Question No. 1A, a verdict of yes.

To Question 1B, a verdict of $3,500.

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To Question 2A, a verdict of no.

To Question 3A, a verdict of yes.

To Question 3B, a verdict of $16,500.

To Question 4A, no.

And so say you all.

(All nodded in the affirmative.)

THE COURT: Poll the jury, please.

You better take the liability questions and pause before you go to the others.

(The jury was polled and all nodded in the affirmative.)

THE COURT: Now go on to Part 2.

(The jury was polled and all nodded in the affirmative.)

THE COURT: Very well. Thank you for serving in this somewhat unusual case, and I suppose you have finished your term.

MR. GOLDSTEIN: If your Honor please --

THE COURT: Just wait a minute, will you please. I'm doing something. I don't care to be interrupted.

MR. GOLDSTEIN: I'm sorry, sir.

THE COURT: They have been polled and I'm looking at the original.

I'm discharging the jurors, gentlemen, at this

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time because of the arrangement that the maintenance and cure item will have to be adjourned, gentlemen, in accordance with your wishes.

MR. STEARNS: No, sir.

MR. GOLDSTEIN: No, sir, that was not in accordance with our wishes.

THE COURT: I will discuss it in the absence of the jury.

I will have to ask you to stay a little while in the jury room. You may retire.

(The jury left the courtroom. Time noted: 12.00 o'clock noon.)

THE COURT: First I want to get through with this verdict, if you don't mind.

Now check me with yours and I will tell you what I have on the original:

1 is no.

2 is yes.

3 is no.

4 is no.

Part 2:

1A is yes.

1B is $8500.

2A, no.

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Since there was a "No" answer, 2B is unnecessary.

3B is $16,500.

4A is no.

And since that is so, the other questions of 4B and 4C need not be answered.

The verdict is signed by all six of the jurors.

As I see it now, gentlemen--you correct me if I'm wrong -- I shall direct a verdict for the plaintiff here in the sum of $8500 plus $16,500, for a total of $25,000.

Accordingly, that is my direction to the clerk.

Now first, is there any motion by anybody?

MR. STEARNS: Your Honor, I want the statutory ten days, please, for motions.

THE COURT: Well, ten days to submit papers, counsellor?

MR. STEARNS: That's correct.

THE COURT: The motion -- what is the motion? Let's know today what the motion is.

MR. STEARNS: The motion will be to --

THE COURT: Just what it is.

MR. STEARNS: All right, if I am directed to make a motion now, with leave to submit papers within ten days, fine.

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Since there was a "No" answer, 2B is unnecessary.

3B is $16,500.

4A is no.

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Ponss v. Montana Walker

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 9 day of Oct , 19 7 at No. 250 Broadway, NY, NY Vols I-II deponent served the within Appendix upon Fulbright + Knaths the Appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 9 day of Oct 1975

.....
Edward Bailey

William Bailey
.....
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0182945
Qualified in Richmond County
Commission Expires March 30, 1976